

FILED

DISTRICT COURT OF GUAM

MAR 21 2005

MARY L.M. MORAN
CLERK OF COURT

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

JAY MERRILL, on his own behalf) CIVIL CASE NO. CV04-00046
and on behalf of all other)
similarly situated voters)
desirous of casting a vote in)
favor of Proposal A at a fair)
and legal election,)

Plaintiffs,)

vs.)

THE GUAM ELECTION COMMISSION;)
GERALD A. TAITANO, in his)
capacity as the Executive)
Director of THE GUAM ELECTION)
COMMISSION, I MINA' BENTE)
SIETE NA LIHESLATURAN GUAHAN)
(The 27th Guam Legislature);)
FELIX P. CAMACHO, in his)
official capacity as the)
GOVERNOR OF GUAM,)

Defendants.)

 **ORIGINAL**

Transcript of Proceedings

before the

HONORABLE JOAQUIN V.E. MANIBUSAN, JR.,

UNITED STATES MAGISTRATE JUDGE

Motion to Strike Appearances of Private Counsel

and

Motion to Remand

Friday, February 18, 2005, 10:40 a.m.

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1 THE COURT: If we could just remain standing. I
2 received a phone call last night and I was saddened to hear
3 that Pedro Atalig from the CNMI had passed away. Mr. Atalig
4 was the presiding judge at the Superior Court in the CNMI
5 from 1991 to 1993. He was an associate justice at the
6 Supreme Court from '93 to '97. He's also a designated judge
7 for the District Court here in the CNMI for some time.

8 One of the very first cases that I heard as a
9 pro tem judge in the CNMI was a case he filed, Demapan versus
10 Karen. That kind of reminds me of the case before the Court
11 today, because in that case, his client was, I guess,
12 arrested for engaging in illegal gambling activities. And as
13 part of his suit, he sued the attorney general and argued
14 that the attorney general was occupying a seat illegally
15 under the constitution of the CNMI.

16 So after much briefing, we agreed with
17 Mr. Atalig's position, really. We ordered, Maya Kara was
18 then the acting attorney general, to step down. We ordered
19 the governor to appoint a new attorney general finding that
20 he had reserved the senate power of the advice and consent by
21 continuously appointing an acting attorney general.

22 So if we could pause in silent memory for
23 Mr. Pedro Atalig.

24 (Silent pause.)

25 THE COURT: Thank you.

1 THE CLERK: Civil Case 04-00045 as consolidated
2 with Civil Case 04-00046, *Jay Merrill et al versus the Guam*
3 *Election Commission et al.* Motion to strike appearances of
4 private counsel and motion to remand.

5 Counsel, please state your appearances.

6 MR. MOYLAN: Attorney General Douglas Moylan on
7 behalf of the Government of Guam.

8 MR. WINEBERG: Rob Wineberg, Assistant Attorney
9 General.

10 MR. PANGELINAN: Mike Pangelinan on behalf of
11 the Governor.

12 MR. CABOT: Good morning, Your Honor. Cesar
13 Cabot for the Guam Election Commission and Mr. Gerald
14 Taitano.

15 MR. ARRIOLA: Good morning, Your Honor. Jay
16 Arriola for intervener amicus Linala Sin Casino.

17 MR. ROBERTS: Your Honor, I'm Tim Roberts on
18 behalf of the plaintiffs in both consolidated cases.

19 THE COURT: All right. Let the record indicate
20 that the parties are here before the Court and the Court
21 decided in a previous hearing that it would hear the
22 Government's motion, the Attorney General's motion to strike
23 the entries of the appearances filed here on behalf of the
24 Governor by Mr. Pangelinan of Calvo and Clark, on behalf
25 of Mr. Taitano and the Election Commission and Mr. Cabot.

1 And the motion for the Government?

2 MR. MOYLAN: Your Honor, we'll be arguing --

3 THE COURT: Mr. Attorney General.

4 MR. MOYLAN: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. MOYLAN: Your Honor, our motion -- I think
7 it was very appropriate for the Court to open up with that
8 acknowledgment of the passing of Mr. Atalig, and I think the
9 question facing the Court today is who is rightfully here to
10 speak before the Court, who has standing to appear before
11 this Honorable Court. And as the Attorney General, Your
12 Honor, I am the appropriate authority to represent all
13 entities within the Government of Guam.

14 And here today, we have sued. And when I said I
15 represent the Government of Guam, the Government of Guam is
16 the people of Guam. And unlike the characterization of the
17 defendants, the Guam Election Commission, the Governor of
18 Guam, they're not the parties in interest here; it is the
19 people of Guam. And --

20 THE COURT: The Government of Guam is not sued
21 by the plaintiffs. It's individual entities and individual
22 persons.

23 MR. MOYLAN: That is correct, Your Honor, but by
24 the Organic Act, the federal statute, the Government of Guam
25 is made up of those individual entities and individual

1 entities do not have a right to come and represent the legal
2 policy for the Government of Guam. It is through the
3 Attorney General in the 1421 GG1 --

4 **THE COURT:** Let's assume that I agree totally
5 with your position that you should be representing these
6 entities, what is the scope and responsibility of that
7 representation?

8 **MR. MOYLAN:** The scope, Your Honor, and under
9 the ex parte we heard in the other cases that are in the
10 briefs, is that the Attorney General shall set the legal
11 policy and shall represent the Government of Guam's interest.
12 The individual members --

13 **THE COURT:** But, see, I'm talking about the
14 interests of the Governor of Guam and the Election Commission
15 and Mr. Taitano. What is the scope and responsibility of
16 that representation?

17 **MR. MOYLAN:** It is to include all legal issues.
18 The Attorney General, by virtue of the elected status, the
19 people's selection of that attorney shall represent the
20 people's interest. The Governor and Election Commission are
21 just stewards of the people's interest. And when it comes up
22 to questions such as whether this case should be fought, the
23 type of defenses to be used, that is within the authority of
24 the Attorney General, not within the authority of each
25 individual member that's being sued.

1 And in this case, you could have -- you could
2 literally have the whole Guam Bar representing the defendants
3 on this case because each party would come in through their
4 respective private counsels and start indicating that this is
5 our legal position, when in fact, they have no right. And
6 this has been debated, argued, and decided throughout the
7 states that have elected attorneys general.

8 **THE COURT:** All right. When I ask the question,
9 I, basically, was referring to provisions in the Rules of
10 Assurance Responsibility, and I'm looking at Rule 1.2, which
11 says that a lawyer, and I'm assuming that when you're
12 defending the Governor or defending an entity, that you're
13 doing in the capacity as an attorney.

14 Rule 1.2 says that a lawyer shall abide by a
15 client's decisions concerning the objectives of
16 representation subject to paragraph C, D, and E and shall
17 consult with the client as to the means by which they are to
18 be pursued. Furthermore, a lawyer shall abide by a client's
19 decision whether to accept an offer of settlement of a
20 matter.

21 Furthermore, Rule 1.4 on communication states
22 that a lawyer shall keep a client reasonably informed about
23 the status of the matter and promptly comply with reasonable
24 requests for information. It also says in Rule 1.4b that the
25 lawyer shall explain a matter to the extent reasonably

1 necessary to permit the client to make informed decisions
2 regarding the representation.

3 All of these references to the Rules of
4 Professional Responsibility, how does that apply to the
5 Attorney General's representation of the Governor and the
6 Guam Election Commission and Mr. Taitano?

7 MR. MOYLAN: Yes, sir. According to the -- in
8 these rules that are Guam Rules of Professional
9 Responsibility were adopted from the American Bar
10 Association's Model Rules. And in those rules, it
11 specifically makes an exception when we deal with Government
12 service. The Attorney General's office is *suigeneris* and
13 does not represent any particular Government entity,
14 Government agent of the people. It's the people of Guam whom
15 are being sued here, Your Honor. They're stewards and acting
16 in capacities as representatives of the people of Guam.
17 Also, Your Honor, the Court --

18 THE COURT: See, that's the problem really that
19 I think I'm missing. You're saying that the Government of
20 Guam -- or the people of Guam are being sued, but yet there
21 are entities that are defendants. And if these entities are
22 to be represented, what is the meaning of representation of
23 these entities? I mean, how are their interests to be
24 represented in like of the Rules of Professional
25 Responsibility?

1 **MR. MOYLAN:** In ex parte, we were being
2 addressed those ethical concerns, and I also referenced, Your
3 Honor, there's two cases that this Court -- this judge had
4 issued two -- decisions of this judge as issued in the year
5 2003. One was the Attorney General versus the Treasurer of
6 Guam in which the Court acknowledged the *suigeneris* nature of
7 the Attorney General's Office, the government attorneys, and
8 that we cannot be treated like private lawyers, and this --

9 **THE COURT:** True. I totally agree with that,
10 because in that instance, you were fighting a suit against a
11 government entity. You were not coming in in defense of that
12 entity. Here, you're coming in in defense of a government
13 entity.

14 **MR. MOYLAN:** Yes, in ex parte, we were addressed
15 that issue, Your Honor. Your Honor, if I might, and I
16 apologize for this, the ethical issue was not raised in the
17 moving papers and Mr. Wineberg was going to reference that in
18 the reply had the other defendants raised it. But since the
19 Court has raised it, may I refer to Mr. Wineberg --

20 **THE COURT:** Well, the questions that I'm raising
21 today were raised by the defendants in their opposition for
22 the motion to strike, generally. It was raised by the
23 Governor's legal counsel.

24 **MR. WINEBERG:** Your Honor, I have, I think,
25 specific responses to your questions and I think we'll

1 address those, if I could. And they come from the Model
2 Rules, they come from the Guam Rules of Professional Conduct,
3 if I may address the Court?

4 THE COURT: Yes, you certainly may.

5 MR. WINEBERG: Thank you. Let's look first at
6 the Guam Rules of Professional Conduct. Let's look at what
7 the scope of the rules say. If the Court will look at
8 paragraph 18, I'll just defer -- just make a note on this,
9 but let me read this to the Court.

10 Well, first of all, on paragraph 14 under the
11 scope of the rules - these are the Guam Rules of Professional
12 Conduct, it's paragraph 14 - "The Rules of Professional
13 Conduct are rules of reason. Other rules define - and I'm
14 skipping some sentences within that paragraph - other rules
15 define the nature of relationships between the lawyer and the
16 clients. The rules are thus partly obligatory and
17 disciplinary and partly constitutive and descriptive in that
18 they define a lawyer's professional role."

19 And I'm going to paragraph 18 of the scope of
20 the Guam Rules of Professional Conduct. "Under various legal
21 provisions including constitutional, statutory and common
22 law, the responsibilities of government lawyers may include
23 authority concerning legal matters that ordinarily reposes in
24 the client in private client lawyer relationships." And this
25 is what we've been saying in this and other cases.

1 Government lawyers serve the Government of Guam. What is the
2 Government of Guam? There is no such thing as the Government
3 of Guam.

4 THE COURT: All right. So if you're serving the
5 interest of the Government of Guam, who is serving the
6 interest of the Governor or Mr. Taitano or the Election
7 Commission?

8 MR. WINEBERG: Those individuals - the Governor,
9 the Election Commission, Mr. Taitano - are fingers on the
10 hand of the Government of Guam. They are part of it. They
11 don't get individual representation because they are all part
12 of one hand, one body. They're just individual parts of it.

13 THE COURT: Let me ask you further. In
14 representing the Election Commission, what have you done to
15 further their representation? What have you done to further
16 that representation?

17 MR. WINEBERG: I'm not sure if your question is
18 getting into attorney-client questions here, but the answer,
19 I think, to the extent --

20 THE COURT: What have you done in terms of
21 pleadings that you've filed on behalf of the Guam Election
22 Commission?

23 MR. WINEBERG: We've reviewed the legal position
24 of the plaintiffs, and to the extent that plaintiffs are
25 correct, we have stipulated that the judgement is --

1 THE COURT: Is that position shared by the Guam
2 Election Commission?

3 MR. WINEBERG: Not the individuals.

4 THE COURT: Is that position shared by the
5 Election Commission?

6 MR. WINEBERG: I don't know. I mean, the answer
7 is no.

8 THE COURT: All right. Then do you see yourself
9 in a conflict --

10 MR. WINEBERG: No, I don't.

11 THE COURT: -- interest position?

12 MR. WINEBERG: Not at all, because they
13 administer the election laws. They do not set legal policy.
14 They do not make legal decisions. If, for example --

15 THE COURT: But the Election Commission is
16 saying that your conclusion that they engaged in an illegal
17 act is not correct.

18 MR. WINEBERG: That's what they think.

19 THE COURT: Right. So how are they going to
20 make -- to present that position before the Court?

21 MR. WINEBERG: Under the Organic Act, they're
22 not entitled to.

23 THE COURT: You mean that the constitution has
24 been lost by the amendment of the Organic Act?

25 MR. WINEBERG: The constitution of -- They have

1 no constitutional rights other than those established in the
2 Organic Act. They have no individual rights to -- Let me
3 give you another analogy. The Government of Guam is one
4 family. It is headed by two parents, or by parents.

5 THE COURT: But let me go back to the basic
6 question. You're suing the Governor. How can you stand
7 there and be suing him, at the same time be saying I'm his
8 lawyer as a defendant?

9 MR. WINEBERG: We're not suing the Governor.

10 THE COURT: But I'm posing that question to you.
11 You sue the Governor --

12 MR. WINEBERG: The Governor wants to take a
13 legal position in court that we're not going to permit him to
14 take.

15 THE COURT: So who is going to represent him?
16 Your argument today is that you have the sole right to
17 represent the Governor in that situation.

18 MR. WINEBERG: That's correct. Let me continue
19 reading from the rules --

20 THE COURT: How can the Court allow that? How
21 can the Court allow you to sue the Governor and then come to
22 court and say, I represent the Governor?

23 MR. WINEBERG: We're not suing him in this case
24 or any other case.

25 THE COURT: But in that scenario, how can the

1 Court allow you to do that?

2 MR. WINEBERG: If we're talking about a
3 different hypothetical, I'll switch gears. Now, I'm thinking
4 about this case and I'm also thinking about this answer that
5 --

6 THE COURT: Well, see, my question is, is there
7 a distinction? Is there a distinction between you suing the
8 Governor and you coming to court and saying, I don't
9 represent the Election Commission but I don't listen to what
10 they say?

11 MR. WINEBERG: Yes, in a different case, there's
12 a distinction if we are suing the Governor. For example, I
13 believe that, Your Honor, when you were Superior Court judge,
14 had the Procurement Appeals case and some other cases where
15 we sued the Governor to make him do something, and Your Honor
16 said you can't do that. But to make him do that and when
17 there is a question that involves his individual authority as
18 Governor, he may be entitled to his own counsel when it is us
19 they're taking an adverse --

20 THE COURT: Where is that stated in the Organic
21 Act or in the laws of Guam? Where does it say that the
22 Governor can retain his counsel?

23 MR. WINEBERG: That he can retain his counsel?

24 THE COURT: See, you're telling me that in that
25 situation, he can have his own attorney. Where is it in the

1 code, in the Organic Act, or in the codes of Guam that says
2 he can retain some counsel?

3 **MR. WINEBERG:** Because that's a separation of
4 powers situation. We are challenging his authority to do
5 something as --

6 **THE COURT:** Is it a separation of powers issue
7 or is it a conflicts issue?

8 **MR. WINEBERG:** It's not a conflicts issue. Let
9 me continue reading from the Professional Rules of
10 Professional Conduct. Under various legal provisions
11 including constitutional, statutory and common law, the
12 responsibility of government lawyers may include authority
13 concerning legal matters that ordinarily reposes in the
14 client, in the private client-lawyer relationships.

15 For example, a lawyer for a government agency
16 may have authority on behalf of the Government to decide upon
17 settlement or whether to appeal from an adverse judgement.
18 Such authority of various respects is generally vested in the
19 attorney general and the state's attorney, state government
20 and their federal county courts, and the same may be true of
21 other government law offices.

22 Also, lawyers under the supervision of these
23 officers may be authorized to represent several government
24 agencies in intergovernmental legal controversies in
25 circumstances where a private lawyer could not represent

1 multiple private clients. These rules of Professional
2 Conduct do not aggregate any such authority.

3 This is, again, paragraph 18 of the scope of the
4 Guam Rules of Professional Conduct. Now, if you look at the
5 commentary to some of the rules, let me read the commentary.
6 Because if you look at this, this isn't an individual client.
7 This is -- Like I said, these are fingers on a hand. And the
8 most analogous --

9 THE COURT: All right. There may be
10 commentaries to some of these rules, Mr. Wineberg, but there
11 are also these decisions surely which specifically hold that
12 when the attorney general decides to come in and defend an
13 entity, it is bound by the Rules of Professional Conduct.

14 MR. WINEBERG: There are cases from certain
15 jurisdictions that hold that. There's a California case,
16 there's a Hawaii case, there's an Arizona case, Missouri
17 case. There's a couple of other jurisdictions that have been
18 cited to this Court by opposing counsel.

19 THE COURT: Are you telling me that that's not
20 good law?

21 MR. WINEBERG: It is not good law. It is a
22 minority view and it is distinguishable on the basis that if
23 you look at those constitutional provisions that create the
24 office of attorney general where structure is corporately
25 different than that that which we have here and in a majority

1 of jurisdictions.

2 In those jurisdictions cited to this Court by
3 the Governor and the Election Commission, every one of them
4 that holds that proposition, and it's a minority view, their
5 constitution says that the attorney general's authority,
6 powers and duties maybe as prescribed by law. That means the
7 Legislature may set those powers and duties. And what their
8 constitution --

9 THE COURT: What is the Attorney General's
10 powers and duties under the Organic Act?

11 MR. WINEBERG: Our contention in this Court and
12 in the United States Supreme Court and the 9th Circuit Court
13 of Appeals in pending cases right now is that we, the
14 Attorney General, has total control of legal policy
15 decisions. That means if somebody gets --

16 THE COURT: Where is that stated in the Organic
17 Act?

18 MR. WINEBERG: By the term Chief Legal Officer
19 for the Government of Guam. And then what you have to do is
20 --

21 THE COURT: Does that allow you to represent
22 individuals? Individual officers of the Government of Guam?

23 MR. WINEBERG: Individual officers sued in their
24 official capacity as officers. I want to distinguish between
25 individual capacity questions where they might be sued in

1 their personal capacity for acting under government or state
2 law from official capacity actions for the territory and
3 rejunctive relief. If an officer as we -- If the Election
4 Commission did something that is a violation of the law and
5 someone takes them to court and the Attorney General discerns
6 that is a violation --

7 THE COURT: Then wouldn't the more prudent thing
8 would be to join as a plaintiff against the Guam Election
9 Commission?

10 MR. WINEBERG: Absolutely not. The more prudent
11 thing to do is to do the right thing. And the right thing is
12 to confess --

13 THE COURT: How do I know who represents the
14 right thing? They may be in the right and not the Attorney
15 General.

16 MR. WINEBERG: The people have spoken as to who
17 their lawyer is.

18 THE COURT: All right. But the people is also
19 represented by the Election Commission.

20 MR. WINEBERG: These people who we respectfully
21 submit are here without authority until this Court determines
22 that --

23 THE COURT: The Election Commission is here
24 because it is a named defendant. It is not here without
25 authority.

1 MR. WINEBERG: It is a named defendant. It is
2 an agency and instrumentality of the Government of Guam.
3 There's one lawyer for the Government of Guam, the Attorney
4 General. Now, if because --

5 THE COURT: So that's the position you take?

6 MR. WINEBERG: Yes. Because of the nature of --

7 THE COURT: I think, really, you know,
8 seriously, we're not arguing that there's only one attorney
9 general. We're arguing what does the role of attorney
10 general, what is the scope of its duty when it comes to
11 coming here to court and saying, I want to defend these
12 entities.

13 MR. WINEBERG: I respectfully disagree, Your
14 Honor. We are arguing about whether there is one attorney
15 general or not because there's one sitting over here and
16 there are two over here.

17 THE COURT: If you come in here and you tell me
18 that my position as attorney general is that the position of
19 the Election Commission is going to be argued before the
20 court, you're sitting right there.

21 MR. WINEBERG: I don't follow you.

22 THE COURT: I said if you come before me and you
23 tell me that my position in representing the Election
24 Commission is to advocate their position, you're going to be
25 sitting right there.

1 MR. WINEBERG: No, their position is what we
2 tell them it is when it comes to being in this court. I know
3 that sounds bold --

4 THE COURT: So they can never tell you that
5 you're wrong?

6 MR. WINEBERG: Oh, they can argue with us all
7 they want. They --

8 THE COURT: So how are they going to put forth
9 their argument to the Court? How are they going to put their
10 argument before the Court if they cannot be represented by
11 any other person?

12 MR. WINEBERG: They will put -- the arguments
13 that will come before this Court on behalf of the Election
14 Commission, the chairman of the Election Commission and the
15 Commission, in its official capacity, which are agencies and
16 instrumentalities of the Government of Guam, the legal
17 position that they will present to this Court is that which
18 is decided by the Attorney General.

19 And that is what Congress intended by the term
20 Chief Legal Officer. Because, otherwise, what you have are
21 people we contend, not to disrespect anybody over here, who
22 have violated the law and want to waste the tax payers' money
23 by arguing about things that they are wrong about legally.
24 One person gets to decide what the legal position is for the
25 agencies and instrumentalities of the Government of Guam.

1 THE COURT: Who decides whether or not the
2 action they've engaged in is legal or not?

3 MR. WINEBERG: The Attorney General does.

4 THE COURT: Not the court?

5 MR. WINEBERG: Well, obviously the Court does.
6 But in terms of presenting what the arguments are going to be
7 to the Court --

8 THE COURT: But by entering into a stipulation,
9 you bypass the Court.

10 MR. WINEBERG: The Court still has to approve
11 it. The Court is still going to make an independent
12 assessment as to whether or not if the Court wants to,
13 whether --

14 THE COURT: So, during the course, let's say of
15 the hearing in that position and the Election Commission is
16 called to testify, what is your position? That they can't
17 testify because you haven't called them in or you haven't
18 authorized that they be called to the witness stand?

19 MR. WINEBERG: If the opposing party calls them,
20 there's not much I can do about that.

21 THE COURT: But there's no opposing -- if
22 they're not going to call the Election Commission, who's
23 going to call the Election Commission is the question.

24 MR. WINEBERG: People confess judgment all the
25 time. That's what we're talking about doing here. Attorneys

1 general confess judgement all the time. That's what we're
2 talking about. And, in fact, let me clarify something for
3 this Court. We've only confessed judgement as to whether
4 there's been a violation in the United States constitution.
5 We have not confessed judgement that the plaintiffs are
6 entitled to the remedy that they seek, which is a special
7 election.

8 And in that respect, the Governor and the
9 Election Commission and the Attorney General are on board
10 with each other. They just want to argue about something
11 that we think is wrong and that is whether the Election
12 Commission violated the United States constitution and the
13 laws of Guam in failing to do what it did or in doing what it
14 did which is failing to mail the 80-page or however long
15 brochure to everybody.

16 On that question about whether they violated
17 the law or not, we are in disagreement. On the question of
18 whether they're entitled -- plaintiffs are entitled to
19 special election as part of the remedy, we're all in
20 agreement. So they'll get their chance to argue about
21 whether or not the remedies that the plaintiffs seek will --

22 THE COURT: But they cannot get the opportunity
23 to argue that they have not violated the law.

24 MR. WINEBERG: That is correct.

25 THE COURT: See, basically, you've foreclosed

1 them from making their argument to the Court.

2 MR. WINEBERG: No.

3 THE COURT: Then how is that to be presented to
4 the Court? That's what I don't understand.

5 MR. WINEBERG: How many fingers - and it's
6 rhetorically, of course - how many fingers get to present all
7 their views if there's only one hand grabbing it? There is
8 one Government of Guam. There is one Attorney General. And
9 that Attorney General represents all the fingers. And when
10 there's a conflict among the fingers, in a case like this,
11 the individual wishes of the client as it would be true in
12 the private sector --

13 THE COURT: It seems to me that you just said
14 there's a conflict in this case. And, previously, you said
15 there's none.

16 MR. WINEBERG: I'm using that term loosely.
17 It's a conflict in terms of they want to argue the merits of
18 whether they violated the law or not and we don't want to.

19 THE COURT: So if they want to argue the merits
20 of their action, you're saying that they cannot?

21 MR. WINEBERG: That's correct. It's a bold
22 statement for Guam. It's a brave new world on Guam thanks to
23 what Congress did in 1998 with the amendment that said there
24 shall be one Chief Legal Officer for the Government of Guam
25 and that shall be the Attorney General.

1 **THE COURT:** So an individual member of the
2 Commission cannot come before the Court and state his
3 position before the Court?

4 **MR. WINEBERG:** He's just one individual member.
5 A corporate body --

6 **THE COURT:** So you're saying they can or cannot?

7 **MR. WINEBERG:** It's like in a corporation that's
8 got a subsidiary corporation or something. But if you look
9 at it in a corporate structure, if you sue Microsoft, you
10 don't get to sue the game and toys division. Or the game and
11 toys division doesn't get to go out and hire its own lawyer
12 if it argues with Bill Gates about what it ought to be doing
13 if involved in antitrust violations or something.

14 If you look at the Government, which is a
15 corporate -- it's a corporate entity. That's what our
16 constitution is, it provides us a corporate entity. And the
17 Government of -- There's only one. There's only one
18 government. So you've got a department in the government, in
19 your corporation, that has a different view than the CEO.
20 The CEO in this case on legal policy matters being the
21 Attorney General. This is not -- this may be new territory
22 for Guam, but it's not unheard of.

23 And, in fact, if you look at the rules and you
24 look at the commentary to the rules, look at the commentary
25 in paragraph 9 to Rule 1.3. This is a quote, "Although in

1 some circumstances, the client may be a specific agency, it
2 may also be a branch of government, such as the executive
3 branch of the Government as a whole.

4 For example, if the action - This is so on point
5 to what we're talking about - if the action or failure to act
6 involves a head of a bureau, either the department of which
7 the bureau is part or the relevant branch of Government may
8 be declined for purposes of this rule.

9 Moreover, in a matter involving the conduct of
10 government officials, the government lawyer may have
11 authority under applicable law to question such conduct more
12 extensively than that of a lawyer for a private organization
13 in some circumstances. A Government lawyer has additional
14 responsibilities --

15 THE COURT: I don't disagree with that because
16 when you sue the Election Commission, obviously you can ask
17 the question.

18 MR. WINEBERG: We haven't sued them. And --

19 THE COURT: See, that's -- In substance, aren't
20 you really suing them?

21 MR. WINEBERG: Very loosely, we are taking that
22 authority to represent themselves in this matter away from
23 them. So in that sense, it's adverse perhaps if they're
24 going to stand up here. It's not adverse once the court
25 decides that these people have no business --

1 THE COURT: It just seems that the positions
2 that you're advocating is inconsistent and adverse to the,
3 let's say the Election Commission. Because you're saying
4 that they violated the law and you're saying that they are
5 not. I don't see how you can bring yourself to a conclusion
6 if those positions are not adverse.

7 MR. WINEBERG: I'm thinking about it, this may
8 be a misapplication of this quote, but if I'm right, I will
9 cut it out.

10 THE COURT: No, see, your position is that they
11 violated the law and their position is that they have not.

12 MR. WINEBERG: But they are just one finger --

13 THE COURT: But you see that we have two
14 different positions here?

15 MR. WINEBERG: No.

16 THE COURT: Yes.

17 MR. WINEBERG: There's only one. They don't
18 have a voice.

19 THE COURT: That they have violated the law or
20 you haven't violated the law?

21 MR. WINEBERG: They don't have a voice. That's
22 what we're arguing about here is whether they are entitled to
23 an independent voice from the Attorney General.

24 THE COURT: See, that's the part that's
25 struggling really when you say they don't have a voice.

1 MR. WINEBERG: I understand that that's
2 troubling, but that's why it's important to read these cases,
3 read the commentary. Let me read a little further. "Thus,
4 when the client is a governmental organization, a different
5 balance may be appropriate between maintaining
6 confidentiality and assuring that the wrongful act is
7 prevented or rectified." The Government of Guam, through its
8 Attorney General, has a responsibility to the public, to the
9 courts, and to the law to uphold the law. And when one
10 finger on that hand violates the law, it is our
11 responsibility to rectify that transgression. And if
12 somebody -- if a --

13 THE COURT: Let me -- just like I said, how do
14 you rectify that? By suing them in court?

15 MR. WINEBERG: Well, in this particular case, we
16 rectify it to the extent possible by --

17 THE COURT: Let's assume it is an agency that
18 has violated the law; what steps would you take to make sure
19 that their violation is ceased? That it stops?

20 MR. WINEBERG: In certain cases, filing a
21 lawsuit against them for doing something --

22 THE COURT: When you do that, are you also going
23 to be representing them?

24 MR. WINEBERG: (No response.)

25 THE COURT: You see, that's --

1 MR. WINEBERG: The rules provide that -- We
2 haven't really faced that problem. The rules provide - and I
3 think I read it earlier --

4 THE COURT: I see that as an essential problem
5 here.

6 MR. WINEBERG: It's not here. It's related but
7 it's different. If I were to -- Let's say the Election
8 Commission announced that, henceforth, it was going to
9 strip search everybody that went into the voting booth and
10 somebody didn't beat 'em to it, we had to sue them. They get
11 their own lawyer for that. I think we've talked about this
12 in another case. Because there's the Attorney General trying
13 to compel them to do something and requiring the Court's
14 assistance to do that. Now, here, they're an ordinary party.
15 They're simply -- And, in fact, let's take another example.

16 Let's take the flip side of them being a
17 defendant. Let's say that - I can't think of a good example
18 - but let's say that the Attorney General wanted them to be a
19 plaintiff in something or needed them to be a plaintiff and
20 to sue something, I don't know, the federal government, but
21 Mr. Taitano and the Election Commission didn't want to sue
22 the federal government; do they get to come into court, and
23 let's say we filed a lawsuit on behalf of Mr. Taitano as
24 chairman in his official capacity and on behalf of the
25 Election Commission against the United States signed Doug

1 Moylan, Attorney General. But they disagree. And they have
2 a meeting and they talk to Mr. Cabot. They say, Mr. Cabot,
3 we want you to go in there and oppose it, file some sort of
4 intervention on our behalf and tell them we don't agree. You
5 know what the courts will say? Mr. Cabot, you don't have a
6 voice in this; the Attorney General is your lawyer.

7 THE COURT: Let's assume Mr. Taitano comes to
8 court and says, Your Honor, dismiss this complaint.

9 MR. WINEBERG: In this particular case or
10 hypothetical?

11 THE COURT: In the case that you just posed. He
12 comes to court and he says, Your Honor, dismiss this case, I
13 never filed it.

14 MR. WINEBERG: How does he do that? You mean he
15 comes personally --

16 THE COURT: The question is not how does he do
17 that. The question is, what do I do.

18 MR. WINEBERG: I'll tell you what the Court
19 does. The court says, Mr. Taitano, by what authority are you
20 standing up here making representations to this Court.

21 THE COURT: Because someone has used my name,
22 Gerald Taitano, and I did not authorize that use.

23 MR. WINEBERG: Well, it could be Taitano, it
24 could be anybody. The significant part about us using his
25 name is the comma after it that says in his official capacity

1 as. Because Mr. Taitanos will come and go, but the office
2 that they represent is who is being sued in this case and who
3 we'd represent in my hypothetical. So what the Court does is
4 say, I'm sorry, Mr. Taitano, and -- or he comes to Mr. Cabot,
5 I'm sorry, but it appears that you are already being
6 represented in this case by a lawyer and that happens to be
7 the Attorney General's Office. You don't have authority to
8 speak on behalf of this organization.

9 THE COURT: And that's your position?

10 MR. WINEBERG: Yes, sir, Your Honor. And it's
11 very -- if you read the comments to the rules, read comment
12 to the Rule 1.13 paragraph 9, read Rule 14 -- paragraph 14
13 and 18 of the Guam Rules of Professional Conduct, take that
14 and you look at the Organic Act, and then if you look at the
15 --

16 THE COURT: Like I said, that's my only problem
17 here, Mr. Wineberg, that it seems to me that if you sued them
18 directly, they have a voice. When you don't -- when you come
19 in under the guise of representing them, they don't have a
20 voice. But if you sue them directly, they do.

21 MR. WINEBERG: Yes. But part of that is just
22 because as a practical matter. Because we may -- in the case
23 where we require the Court's assistance to compel them to do
24 something, where we are adverse to them and maybe we say, you
25 must do that. But I mean, that's an option. But as a

1 practical matter, it makes sense because we're having a
2 dispute. We can't simply order them to do it, we require the
3 Court's assistance. And in that case, the Court --

4 THE COURT: And in that case, they have a voice
5 before the Court.

6 MR. WINEBERG: In that hypothetical, I think
7 they would have a voice. Now, how that's done --

8 THE COURT: And in that case, they have the
9 right to independent representation.

10 MR. WINEBERG: Not exactly. I hate to say this,
11 it might -- it might be deemed prudent and advisable by the
12 Attorney General to say well, we'll let Mr. Cabot do it. But
13 in this hypothetical, other attorneys general who are chief
14 legal officers of their respective governments, what they
15 have done is they assign a lawyer within the office or
16 appoint someone outside the office and say, you will
17 represent this person; we'll establish a Chinese wall between
18 you and the lawyer in the office taking this position.
19 That's one practical way to do that.

20 THE COURT: And if that lawyer ultimately wins,
21 does he get fired the next day?

22 MR. WINEBERG: That I respectfully suggest we
23 cross that bridge when we come to it. I would hope that no
24 attorney general would do something like that. But I just --

25 MR. MOYLAN: He gets promoted, Your Honor.

1 MR. WINEBERG: Oh, maybe he would do it. Did
2 you say yes or no?

3 MR. MOYLAN: He gets promoted.

4 MR. WINEBERG: Oh, he gets promoted! Yeah,
5 actually, no, obviously if Mr. Cabot --

6 THE COURT: If he gets promoted so his next
7 advice is next time don't send another assistant attorney
8 general and now we obtain independent counsel.

9 MR. WINEBERG: We'd probably hire a lawyer where
10 he was and so he's on our team instead of the other team.
11 But I just wanted to address this conflict issue, and I want
12 to turn it back over to the Attorney General, on the merits
13 of what does it mean to be Chief Legal Counsel, all right.
14 Because I understand the Court's hesitancy and reserve about
15 this.

16 I understand that everybody's breaking the Rules
17 of Professional Conduct and you're looking at these things
18 and -- because that's the nature, until 1999 and 2000, that
19 the first elected attorney general -- that's the way it was
20 on Guam; you had someone who was appointed who did what his
21 appointing authority, the Governor, told him to do and there
22 was never this kind of independent legal policy set.

23 What you have, if you look at it, under the
24 Organic Act, is the Governor and Legislature had certain
25 powers to establish certain things. When they passed the

1 Organic Act, there was almost a fourth branch with respect to
2 legal policy and legal positions and representation of the
3 Government of Guam and its agencies and instrumentalities in
4 the courts.

5 And Congress said, there shall be an attorney
6 general, there shall -- Previously, it was the Governor who
7 got to make that determination. And whenever even the Guam
8 Legislature tried to take that authority away from the
9 Governor, the federal courts said you can't do that. But now
10 Congress has said, you have an attorney general who has these
11 powers that the Governor and other agencies formerly used to
12 have, or used to have --

13 THE COURT: See, Congress merely said we have an
14 attorney general who is the Chief Legal Officer of the
15 Government of Guam. That's the extent of Congress's
16 pronouncement.

17 MR. WINEBERG: And that's what this Court has to
18 decide; what does that mean.

19 THE COURT: And don't you think that you also
20 need to determine what that role is when it comes to the
21 representation of government officials and government
22 entities.

23 MR. WINEBERG: You know, I think that's a flip
24 note to the Court's opinion saying I -- recognizing that in
25 this transition that old conflicts rules, old rules of

1 Professional Conduct -- well, the current Rules of
2 Professional Conduct actually provide for this very situation
3 to the extent that the scope of the rules at all even apply.
4 And the funny thing about is, is that the rules are limited
5 by these provisions.

6 THE COURT: It seems that more and more courts
7 are saying that these rules do apply.

8 MR. WINEBERG: Within the parameters of this --
9 of understanding the nature of a government and lawyer and
10 his clients, being the Government of Guam and its agency, in
11 which the government lawyer has more control over the --

12 THE COURT: Frankly speaking, it just seems that
13 they're coming to that conclusion because it just doesn't
14 make sense, Mr. Wineberg, that you have entities there and
15 you're saying that you represent them but their positions
16 cannot be made known to the Court. Like I said, that's
17 probably one of the reasons why these courts have gone and
18 said that the Professional Rules apply.

19 MR. WINEBERG: Well, first, I respectfully
20 disagree that there's that many courts that are saying that.
21 We've seen cases --

22 THE COURT: I've read quite a number that are
23 not in the briefs that have been filed.

24 MR. WINEBERG: Perhaps maybe if we could address
25 those, I might be familiar with the cases or the

1 jurisdictions that the Court is talking about.

2 THE COURT: Well, I figure if it's not in the
3 case that he cited, you probably haven't read it.

4 MR. WINEBERG: That hurts, Your Honor.

5 THE COURT: Well, that applies to the other
6 side, too.

7 MR. WINEBERG: Well, I've read -- Between us,
8 we've read quite many, many, many, many cases. I know that
9 I'm familiar with the cases that have been cited to the
10 Court. There's jurisdictions any way and I don't know if
11 we're talking about California or Hawaii or Arizona or Utah
12 or some of these other cases. I know what is distinguishable
13 there and we've distinguished those. But I think that's a
14 minority view as to adopting. But even if you -- even those
15 courts who are doing that who said, well, they have a
16 traditional attorney-client privilege. Yeah, you have to
17 take a step back --

18 THE COURT: Well, there's a recent case out of
19 West Virginia that basically decided on an issue that seems
20 to say that it's not per se inorganic for their legislature
21 to allow other entities to have independent counsel.

22 MR. WINEBERG: That would be McGraw?

23 THE COURT: I'm not so sure.

24 MR. WINEBERG: 2003 case?

25 MR. MOYLAN: 2002 case.

1 MR. WINEBERG: Or 2. I'm not familiar enough
2 with that to distinguish it for the Court. But, actually, I
3 think that case is actually rather helpful to us to use and I
4 have seen it in the past.

5 THE COURT: Actually, it's not because it said
6 that it's not unconstitutional per say or efficient to allow
7 other agencies to have independent counsel.

8 MR. WINEBERG: I would have to look at that
9 case. But we've been looking at that case, actually, and
10 thinking it's quite helpful to us. Now, I don't know what
11 West Virginia's constitutional structure is and whether it
12 holds that -- whether its constitution says that the Chief
13 Legal Officer may have powers, duties as maybe prescribed by
14 law. That may be the distinction. I don't know.

15 THE COURT: Well, you're right, it is the McGraw
16 case, but you haven't cited it. And I'm not so sure whether
17 you haven't cited it because its holding doesn't support your
18 position.

19 MR. WINEBERG: No, I think if it does -- The
20 first reason we haven't cited it is it has come to my
21 attention subsequent; that's why it's familiar now of why I'm
22 not very close to it. It came to my attention subsequent to
23 the filing of this. But if the Court would like, if we can
24 get copies of it and take a brief recess, I'll read it.

25 THE COURT: That's all right. If there's

1 nothing else, let me hear from the other side.

2 MR. WINEBERG: Well, I think the Attorney
3 General may still want to talk about the nature of the powers
4 and what it means to be Chief Legal Officer.

5 MR. MOYLAN: Thank you, Your Honor. Your Honor,
6 I think listening to the discourse that was going between the
7 Court and our office, if the Court steps back a moment, I
8 know this Court is very good for being an equitable judge and
9 looking at the common sense approach of things. If the Court
10 promotes the position as the private attorneys would have the
11 Court promote, it is going to encourage people, such as the
12 plaintiffs in this case throughout the Government of Guam,
13 throughout this island, to selectively choose, instead of the
14 Attorney General, which has its own legal opinion on certain
15 matters; they will go to every government official and sue
16 them in their individual -- or in their official capacities
17 in order so that they can come in and express to the Court
18 what they believe that position should be. In this case, you
19 have the Governor and the Election Commission that were
20 brought in, and maybe rightfully so. In another case, you
21 may start getting plaintiffs picking and choosing which parts
22 of this Government --

23 THE COURT: See, I'm constrained to make
24 decisions as to this case only.

25 MR. MOYLAN: I understand, Your Honor.

1 THE COURT: And this case only is not a scenario
2 that you're throwing out to me.

3 MR. MOYLAN: In actuality, Your Honor, this is
4 probably the century of legal reasoning that came to the
5 position of what our position is today. We're not making
6 this out of wool cloth, Your Honor. My being here for two
7 years, I've looked over hundreds of cases that deal with
8 every aspect of the powers and duties of the Attorney
9 General. There's a century of case authority behind this
10 language that was adopted.

11 THE COURT: Let me further ask this question.
12 Is there any problem allowing you to make your position known
13 but at the same time allowing them their counsel to advocate
14 their position before the Court.

15 MR. MOYLAN: I believe there is, Your Honor, and
16 for several reasons. The most important one is it goes to
17 what Congress gave to Guam when it said the language that
18 Mr. Wineberg and the Court were just looking at; the Chief
19 Legal Officer of the Government. It interferes with my right
20 to be in this position alone without having people that never
21 ran for this office --

22 THE COURT: Is it really interfering? Because
23 you're coming to the Court and telling me that they engaged
24 in an illegal act.

25 MR. MOYLAN: I believe it is, Your Honor,

1 because it's taking away this Court's valuable time and our
2 valuable time having to listen to positions that shouldn't be
3 brought before the Court. They are not here as legal
4 officers of the Government. They're here as Government
5 officials executing ministerial or discretionary tasks. I'm
6 here to present to the Court, as an officer of the Court, the
7 public's position on this matter. And the public put them
8 into those offices.

9 **THE COURT:** See, that's my point. You're here
10 before the Court and telling me what's the public's position.

11 **MR. MOYLAN:** Vis-a-vis those individuals.

12 **THE COURT:** See, that's something that I can't
13 see really. If you're advocating the public's position, what
14 is their individual position?

15 **MR. MOYLAN:** Their individual positions are
16 between the Attorney General and them; the dialogue that goes
17 on. If I decide on behalf of the people - and I'm not saying
18 I'm right, Your Honor. The Court will decide whether -- what
19 is the true law --

20 **THE COURT:** But how is their position to be made
21 known to the Court if they don't have a voice to make that
22 position known?

23 **MR. MOYLAN:** They don't have the voice. And
24 that goes to the second part of why I should be the only one
25 here. How much is each Government official spending on legal

1 fees for purposes of making their voice known? The people
2 did not choose them to come here to the Court to give their
3 legal position.

4 They said, Attorney General, you're going to
5 represent their legal position. And the other jurisdictions
6 have entertained that question as well. When it comes down
7 to a court action and litigation, the Attorney General
8 controls the public officials' legal positions period. In
9 the Chief Legal Officer states, which is again, as
10 Mr. Wineberg pointed out, there's only a limited number of
11 states that use the word Chief Legal Officer.

12 They have interpreted the ethical rules to the
13 extent that they do not -- they are not to be treated as
14 private counsels. They have their own private counsels.
15 There is no ethical conflict that is recognized in those
16 jurisdictions. And it comes down to the principle of
17 government and how the government is run. It comes down to
18 the principle of tax payer efficiency. You don't want to
19 give these Government officials the ability to come before
20 you to consult with their client to charge the public, the
21 people that voted me into office.

22 I'm on a fixed salary. The public says, you
23 shall be the Attorney General at 90% of the judge's salary.
24 They didn't say, Government official, you can go to court any
25 time you want and charge us for that legal representation.

1 And I know that's just one half of the equation. But the
2 bigger part, Your Honor, is what Congress intended when it
3 said Chief Legal Officer, and said, Guam Legislature, you can
4 make this Chief Legal Officer elected.

5 The Legislature in '99 said, we shall make him
6 elected. And then the people - that is the most compelling
7 argument, is that the people said - you will be our lawyer.
8 Now, they also said that you will have an Election
9 Commission. They also said that you will have a Governor of
10 Guam. And that is the people.

11 But when we come before this Honorable Court,
12 the Governor isn't here in my presence arguing the legal
13 doctrine. The Governor's only for purposes of doing his
14 duties as authorized under law. I am to come into court to
15 express the Government of Guam's position including each
16 member, as Mr. Wineberg pointed out, the fingers of this
17 Government of Guam.

18 We're multifaceted. We could have a hundred
19 litigants in this courtroom and each would have his own
20 private lawyer under the way that the defendants would have
21 the Court analyze everything. Even more so, Your Honor, why
22 am I an elected official if most of this Government is made
23 up of cabinet members. You know, if this was -- And, again,
24 I know the Court said we're all looking at this case, and the
25 Election Commission is made up of -- actually, the Election

1 Commission is made up of appointees of the Governor. You
2 know, if we had a case, why is there an attorney general in
3 position at all if --

4 THE COURT: Except for one member, right?

5 MR. MOYLAN: Yes, the one that all -- six of
6 them.

7 THE COURT: The six have to agree and accept.

8 MR. MOYLAN: That is correct.

9 THE COURT: So one is not appointed by the
10 Governor?

11 MR. MOYLAN: That is correct. So if we had a
12 situation where the Government of Guam is sued but then you
13 have all these five different directors, well the Government
14 of Guam is going to come in through the Attorney General and
15 say, well, this is our position, Your Honor. But then one
16 fifth -- or I'm only one fifth of the equation. Four fifths
17 of the equation are going to be each cabinet member, which is
18 taking instruction from the Governor giving their positions.

19 And that's why I believe the rule was made in
20 the other jurisdictions, including Illinois, that this court,
21 as a Superior Court of Guam judge, has incorporated. I think
22 it's the Feeney case; that for purposes of coming before the
23 Court having to stand where I'm at, it's only the Attorney
24 General when you're talking about the Government of Guam.

25 Your Honor, I also reference to the federal

1 question. This is -- as to Your Honor is a Federal
2 Magistrates Judge; a Supreme Court of Guam decision should
3 not be looked at and definitely is not binding and precedent
4 upon this Honorable Federal Court. The language is
5 congressional. There's no question about the fact that 48
6 USC 1421 GG1 was a statute passed by the US Congress.

7 THE COURT: Maybe that could be best put for
8 rebuttal, I suppose, because I haven't heard from the other
9 side yet. They haven't made that argument yet.

10 MR. MOYLAN: Thank you, Your Honor; just one
11 closing comment then. Two weeks ago, Congress, I believe,
12 went through some confirmation hearings for the United States
13 Attorney General, who's Mr. Gonzales. In the commentary that
14 the Congress made in the confirmation process, they wanted to
15 ensure that the Attorney General was not the president's
16 attorney. And they made it clear on the national discourse,
17 the media that was released for what Congress was saying that
18 Mr. Gonzales was truly going to be the people's Attorney
19 General.

20 And I believe that highlighted the fact that
21 even in an appointed attorney general situation, which after
22 1999 -- actually, 1998 all the way to 2002, there wasn't an
23 appointed attorney general. But the appointed Attorney
24 General was not the attorney for the Governor on Guam. Like
25 Mr. Gonzales, he is the people's attorney general and

1 Congress made that very clear when they confirmed AG
2 Gonzales.

3 And in this case, we will have disagreements,
4 because they serve the master, the Governor, in many
5 respects. The Attorney General serves the public and the
6 people. And I think that's an important play that has to be
7 analyzed here that the Attorney General must come in and
8 represent all parts of the Government and the only attorney
9 to talk before the Honorable Court. Thank you, Your Honor.

10 THE COURT: Mr. Pangelinan.

11 MR. PANGELINAN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. PANGELINAN: Your Honor, I did not hear
14 anything in Mr. Wineberg's reading of the commentary to the
15 Professional Rules of Responsibility that says anything about
16 the Governor not having a voice in the proceeding which he's
17 a defendant.

18 Your Honor, I think the Court seized upon,
19 really, the focal point, the main central problem, with the
20 Attorney General's argument in this case. The Attorney
21 General would like this case to be a case where you're
22 balancing the two roles of the Chief Legal Officer, the one
23 role as being representative of Government officials to
24 litigation, the other role being a guardian of the public
25 interest who may bring actions against officials to enforce

1 the law whenever the Attorney General deems that the public
2 interest requires that.

3 This case is not about both of those roles. And
4 certainly nobody disagrees that those rules both exist, and
5 nobody, as the Court pointed out, nobody's arguing that
6 there's only one attorney general. There is only one
7 attorney general. It's a very important position, Chief
8 Legal Officer. In some cases, including cases that this
9 Court has heard and are pending before the Court, both of
10 those two roles sometimes come into play in the same case.
11 And they make for some very interesting ethical discussions
12 and legal discussions.

13 This is not one of those cases, Your Honor.
14 This case involves only one of the Attorney General's two
15 roles: The role of being an attorney appearing on behalf of
16 Government defendants in litigation. Despite what they may
17 say in the briefs and despite what they may say in Court this
18 morning, the Attorney General's role of being the guardian of
19 the public interest is not at issue in this case.

20 Your Honor, it is already in the record there's
21 a complaint that's been filed in this case, and I'll refer
22 the Court to paragraph 44 in the plaintiff's complaint, which
23 says, the Attorney General is the Chief Legal Officer for the
24 Territory of Guam withstanding authority to institute legal
25 proceedings, to protect the plaintiff and the people of

1 Guam's fundamental right to vote. But he's refused to do so.

2 The Attorney General has not sued anyone in this
3 case on behalf of the public interest. The only involvement
4 the Attorney General has in this case is in their other role,
5 representational capacity as representatives of Government
6 defendants. What the Attorney General is doing in this case
7 and the reason why it leads to this kind of confusing issue
8 about their respective roles is they are trying to invoke
9 their other role as protector of the public interest and
10 bringing it into a case in which they're only involved
11 because they're supposed to represent Government defendants.

12 In this case, they appeared on behalf of the
13 Governor and they appeared on behalf of the Election
14 Commission. So their job in this case is to defend the
15 Governor, to defend the Election Commission's position in
16 this litigation. But they don't want to do that here, Your
17 Honor, because we all know what would happen if they did.
18 Just like they did in Moylan versus Camacho where they
19 brought a suit against the Governor to compel him to appoint
20 by Procurement Appeals Board because they believe that
21 public interest required that they take that action.

22 If they did that in that case, the Governor
23 would get separate counsel, and even they don't dispute that
24 he's entitled to separate counsel in that scenario. The
25 Election Commission has separate counsel; they argued their

1 positions, they defend the case before the Court and the
2 Court would make the call and decide the outcome. That's
3 what has to happen here. It can't happen unless all the
4 defendants are given a voice in the court.

5 We already know from the Attorney General's
6 position that the Governor can't get a voice in court through
7 the Attorney General's office. We know what the Governor's
8 position is. The Governor actually signed a bill into law,
9 October 27, to clarify the requirements of -- the mailing
10 requirements for the proposal for the initiative in order to
11 ensure --

12 THE COURT: Are these positions by the Governor
13 and the position by the Attorney General, are they in
14 conflict at the moment?

15 MR. PANGELINAN: Yes, they are, Your Honor. The
16 stipulation that was signed the same day that the Governor
17 signed the bill into law on October 27 sought to essentially
18 nullify the election and invalidate the election that was
19 going to take place. It's a direct conflict, Your Honor.

20 And one thing I want to mention that I heard
21 mentioned this morning is that there shouldn't be a hundred
22 litigants in the Court each of their own separate counsel.
23 There shouldn't be. There should be one attorney. There
24 can, most of the time, be one attorney representing the
25 interest of all the different litigants. And it should be

1 the Attorney General.

2 THE COURT: Can I ask you further, if the
3 Attorney General were to come in here and say, we're going to
4 advocate the position of the Governor, would you give way to
5 the Attorney General?

6 MR. PANGELINAN: Your Honor, if the Attorney
7 General had taken that position in this litigation, I don't
8 think we'd be here. I don't think the Governor would have
9 any need to have separate counsel. Because, Your Honor, the
10 Governor is not just a finger; the Governor was elected as
11 Chief Executive. Elected by the people just like the
12 Attorney General. They also elected the Governor to
13 faithfully execute the law, to supervise in the executive
14 branch.

15 But how can you ever actually do that if there's
16 no way for him to have a voice in court when he's named as a
17 defendant? What's happened is that it's clearly an attempt
18 to silence the Governor's voice, Your Honor. And there are
19 no cases in any jurisdiction, not even Alabama, that's ever
20 held an attorney general has the power to take public policy
21 decisions away from the governor in the courts through a
22 stipulation.

23 We've been in court in a number of different
24 courts in different cases arguing these same issues about
25 representation. And each time that I've been in one of these

1 hearings, I hear the Attorney General's office mention that
2 there's this general rule out there that the Attorney General
3 as Chief Legal Officer has unfettered control and dominion
4 over all litigation matters. And it's spoken as though
5 that's just an accepted fact within the case law.

6 But, Your Honor, I respectfully disagree with
7 that. I don't think that is what the case is saying. I
8 think what most cases say when they've addressed this type
9 of situation where the Attorney General is just a
10 representative; he's not suing anyone, he's not appearing on
11 behalf of the Government, he's appearing on behalf of an
12 individual government litigant.

13 Most of the cases say that in that capacity, the
14 Attorney General has to actually represent the positions of
15 that litigant, of that defendant. And we cited cases in our
16 briefs. There's a case actually that comes pretty close to
17 the facts of this case out of North Carolina in which the
18 Attorney General tried to confess to judgement, which is what
19 Mr. Wineberg said that you can confess to judgement.

20 But the Court didn't let that happen because the
21 Attorney General stipulated to judgement and it was without
22 his client's consent. And that's the Kaiser vs. Department
23 of Transportation case, North Carolina, involving a dispute
24 with the Department of Transportation in which the Attorney
25 General was representing the department and tried to

1 stipulate to judgement without his client's consent.

2 The Court, in that case, as the courts do in
3 most cases where that is the role of the Attorney General in
4 the case as a representative, they distinguish between the
5 two roles. And they said when the court's representing a
6 state agency, and he's acting on its behalf, he's got to
7 advocate on its behalf. But when he's representing public
8 interest, then he has control over litigation and dominion as
9 other language in the cases mentions.

10 In other cases in a case from Iowa, it also
11 involves the Department of Transportation; that's the Motor
12 Club of Iowa case. Same sort of scenario. In that case it
13 was a question of whether to take the matter up on appeal.
14 The Department of Transportation lost the case in lower court
15 and the Attorney General wanted to appeal, but the department
16 didn't want to.

17 The Court said, since you're only there as a
18 representative of the department, you have to consult with
19 your client and get your client's consent before you can
20 appeal. These are jurisdictions where the attorney general
21 is in their constitution. He's a constitutional officer.

22 In the Motor Club of Iowa case, they made the
23 argument, but wait, I'm a constitutional officer, I have the
24 right to control and have complete dominion over litigation
25 decisions. And they said, well, that may be true that you're

1 a constitutional officer but you're also the representative
2 of this litigant in this particular case. So as that
3 litigant's attorney, you can't do it. You have to get your
4 client's consent before you appeal.

5 And so the department of state government was
6 sued and the Attorney General appeared to defend the
7 department, not to assert his mission of the state interest.
8 And there's other cases, Your Honor, and it really doesn't
9 make a difference for this -- for purposes of this issue, the
10 two different roles, whether -- how -- what the language in
11 the constitution of the Attorney General's -- the preface --
12 the preface to the Attorney General's office sets when it
13 says Chief Legal Officer or not; the constitutional law sets
14 it.

15 The question is not whether it's a
16 constitutional position. The question is what is the role?
17 What are the two roles? Everyone recognizes that they've got
18 these two roles, but they've got to actually fulfill both in
19 the case. And in a case like this, where they're only
20 involved because of one of those roles, they got to actually
21 represent the interest of their client.

22 The Attorney General, in the briefs, points out
23 that we have not cited any case that stands for the
24 proposition wherein the Attorney General cannot just
25 stipulate and resolve the case that has the effect of undoing

1 something the Governor has done. They said we haven't cited
2 any case law that stands for that proposition law.

3 Quite frankly, Your Honor, I'd be surprised if
4 there is any case law -- any case that has that scenario,
5 that factual scenario, where an attorney general will
6 stipulate to the invalid election right after a bill is
7 passed to actually require the election to go forward against
8 the desires of the governor and the legislature that the
9 court's representing the case.

10 I would be surprised if you ever find that
11 factual scenario. I'll actually be more surprised if you
12 ever have a court that would allow that to happen. That
13 hasn't happened. There is no case that's allowed that. In
14 fact, this Court, in its order of October 29 in this case,
15 didn't allow that to happen because this Court denied the
16 stipulation that the Attorney General tried to enter into on
17 behalf of all the defendants.

18 But the attempt that's being made here, Your
19 Honor, and I think the Court realizes is that the blurring
20 distinction between these two different roles, and they're
21 bringing in the public and destroying it into a
22 representational capacity role case, which is what this is.
23 If they feel that the public has been harmed by the election,
24 then it's their duty to bring an action to protect the public
25 interest. That's their job to do that. They haven't done

1 that.

2 If they come into the case and represent the
3 Governor and the Election Commission, then they have to
4 advocate for them. That's their job, too. The case is cited
5 by the Attorney General. There's a lot of cases out there.
6 There's been so many briefs in different cases in different
7 motions that have cited essentially the same line of cases.
8 Lots of them have broad knowledge about attorney general,
9 chief legal officer, complete control over litigation
10 matters.

11 And they cite a string site of pages and pages
12 of cases that have that same sort of language. If you look
13 at most of them, you're talking about cases where the
14 Attorney General is in the case one reason or another; he's
15 in the case on behalf of the public interest, either suing
16 someone on behalf of the state or the state was sued.
17 Thurberry versus Care, out of Oklahoma, is one such case.
18 Salida versus Kowskigina (phonetic), Minnesota, opinion of
19 justices, that's New Hampshire, Michigan State Chiropractic,
20 Public Defender Agency versus Superior Court; that's Alaska.

21 In those cases, the attorney general was
22 involved in the case because of the public interest. So, of
23 course, they're going to have control over that litigation
24 because he's the spokesperson for the legal position of the
25 public when he's suing on behalf of the public interest or

1 when he's defending the government.

2 Some cases though, it's true, I'm not going to
3 -- I have to be honest with the Court. There are some cases
4 out there where some jurisdictions that make the same mistake
5 of blurring the distinction between these two different
6 roles. And there's a couple of jurisdictions, Massachusetts
7 and Alabama, the Feeney case, they cited in the ex parte
8 Weaver case, which seems to be the case they like to cite the
9 most, where they have allowed the Attorney General to
10 override the wishes of their client in certain litigation
11 matters.

12 And in those cases, they involve appeals --
13 Feeney involved an appeal that was taken against the wishes
14 of the client, the government litigant. The ex parte Weaver
15 involved an appeal also, but both jurisdictions had
16 constitutional officers. But in neither case and in none of
17 the cases that have been cited before the Court is there ever
18 a case where you silence the governor's voice in litigation,
19 in any litigation.

20 And, in fact, most of these cases, most of these
21 courts allow the governor to have a voice in any time he
22 wants one; he can come into court and have his own voice if
23 he wants one. He's the chief executive. But in this case,
24 Your Honor, it's even a stronger case for that proposition
25 because he's a named defendant here.

1 And if you look at the cases, even the cases
2 that this Court -- that Your Honor decided in the Superior
3 Court, Moylan versus Camacho, the Court held in that case
4 that the Governor alone is charged with the faithful
5 execution of the laws of Guam and only the Governor can
6 appoint members to the Procurement Appeals Board. That's
7 what Guam law says.

8 This case, the Governor is being sued to compel
9 him to issue a proclamation pursuant to 3GCA 13 to order a
10 special election. And there's another statute out there that
11 allows the Legislature to do the same thing. That's why the
12 Governor -- one of the reasons why the Governor is in the
13 case because someone's trying to make him do that. Just like
14 someone was trying to make him appoint members to the Appeals
15 Board -- the Procurement Appeals Board, in the Camacho case.
16 The Governor has to have a voice in this case. The Governor
17 should have a voice when he wants to come to court and
18 advocate his position as chief executive, especially in a
19 case where he's a defendant asked to do something that only
20 the governor can do.

21 **THE COURT:** When is it inappropriate for an
22 agency not to deliver to an opinion by the Attorney General?

23 **MR. PANGELINAN:** Well, I think that --

24 **THE COURT:** Do you say, well, this is the
25 Attorney General's opinion, we're abiding with it, and when

1 do you say that you cannot? Or when do you come to the
2 conclusion that I won't listen to what the Attorney General
3 says?

4 **MR. PANGELINAN:** Well, I think that the agency
5 -- these are public officials elected to do a job.
6 Presumably, they're chosen because they've got qualifications
7 and they can -- and they know what they're doing. I mean,
8 elected officials are presumed to be doing their job when
9 they take an action. If they disagree in a case where
10 they're a named defendant, if they disagree with the legal
11 position, they should at least have the voice to be able to
12 present it to the Court. Attorney General opinions are very
13 important because the Attorney General does express the legal
14 --

15 **THE COURT:** Let's assume the Attorney General's
16 sends a memorandum to the Election Commission, the contract
17 that you're about to engage into, I find not to be illegal;
18 shouldn't it just end right then and there?

19 **MR. PANGELINAN:** I would think that if that
20 were the case, that, yes, it should end right there because
21 the agency should listen to the Attorney General -- should
22 listen to that opinion.

23 **THE COURT:** Care the Attorney General says what
24 you did was illegal but you're not listening.

25 **MR. PANGELINAN:** Well, that's why the Attorney

1 General has the right as Chief Legal Officer to take it to
2 the Court, just like he -- He's certainly willing to do it;
3 we know that. The Governor is defendant in a few different
4 lawsuits now. But that's the role and that's why the
5 Attorney General --

6 THE COURT: I'm just trying to figure out when
7 do you listen and when you don't listen.

8 MR. PANGELINAN: I think you should always give
9 great weight to any opinion of the Attorney General. And I
10 think that -- I would say most agencies do unless -- if they
11 have reason to disagree, then it would have to be a pretty
12 strong reason and they'd have to -- they just need the right
13 to be able to present that to the Court.

14 But if they do disagree, they better be willing
15 to back it up, because they're gonna get sued by the Attorney
16 General, which is not much fun. And that's something that I
17 think is going to definitely factor into any decision that an
18 agency makes. They decide that they -- that they're
19 completely clear and firm that they want to take a different
20 course of action and they've been named as a defendant, they
21 need the voice. The Attorney General can be involved in the
22 case on the other side, but they have to at least be able to
23 present their position to the court.

24 And I just want to just close by saying that I
25 don't think anything that I've said this morning is intended

1 to indicate that the Governor thinks the Attorney General is
2 his mouth piece. Clearly, he's not. The Attorney General is
3 not the Government mouth piece. The Attorney General was
4 elected to protect the people and to be in charge of
5 protecting the public interest and bringing actions and to
6 enforce the laws of Guam.

7 And the people also elected the Governor. And
8 how can the Governor faithfully execute the laws and do what
9 he was elected to do without a voice in the Court. The
10 Attorney General is the only -- if the Attorney General is
11 the only elected official that actually has a voice in the
12 Court, then what's the point in having a judicial system when
13 it comes to the Government if the Attorney General disagrees
14 with anything the Governor's does, just have an action filed
15 --

16 THE COURT: I guess your remedy is not to vote
17 for him on the next election.

18 MR. PANGELINAN: Maybe, Your Honor, but I think
19 that -- I would just say that no court has ever allowed the
20 attorney general to silence a governor in a case and it's
21 never happened in any other jurisdiction. It definitely
22 should not happen here. The Attorney General always has
23 access to the courts when he needs to enforce the public
24 interest and he's certainly been willing to do that even if
25 it means suing the Governor. But when that happens, the

1 Governor has to be able to come and defend himself just like
2 this Court held in Moylan versus Camacho. If there's a
3 disagreement, it's the Court, not the Attorney General, who
4 makes the decision.

5 THE COURT: And I gather from what you're saying
6 is that the Attorney in this case has not chosen to embody a
7 public position because he's coming in to defend you?

8 MR. PANGELINAN: That's right, Your Honor.
9 Thank you, Your Honor.

10 THE COURT: All right. Mr. Cabot.

11 MR. CABOT: Morning, Your Honor.

12 THE COURT: Morning.

13 MR. CABOT: Your Honor, the Attorney General is
14 saying that we are all part of the same family, but as you
15 know, Your Honor, we all know sometimes even family members
16 get into disputes. But somehow we all manage to resolve
17 things and get on with being family again. And I think
18 that's what happening now. I agree that these are the
19 growing pains, the struggles that we're going through in
20 trying to define the role as attorney general.

21 But respectfully so, Your Honor, I believe that
22 the Attorney General is overreaching and going beyond what he
23 is authorized to do so under the Organic Act and under the
24 laws of Guam. Now, for purposes of this motion, Your Honor,
25 with regard to my clients, the issue is, can the GEC and the

1 Executive Director hire or engage its own independent counsel
2 instead of the AG.

3 And I think it's important, Your Honor, to look
4 at the facts of this case. Because if we just look at the
5 broad stroke gloss over scenario of what is happening, then
6 it really doesn't draw out the burdens, the hardships, the
7 difficulties that the Agency and the Executive Director will
8 face if we take a very rigid stance on this issue.

9 In this particular case, Your Honor, the issue
10 is -- of the case is, did the Guam Election Commission and
11 the Executive Director follow the election code with regard
12 to an initiative measure, Proposal A, the gambling initiative
13 in sending out the election pamphlets, which, by law, are
14 supposed to be transmitted to all of the registered voters on
15 Guam, the number about seventy thousand more or less, prior
16 to the 2004 November general election.

17 Now, obviously the plaintiffs contend that the
18 Guam Election Commission did not follow the law, that the law
19 required that the entire fifty-six paged initiative measure
20 be sent out to each and every of the seventy thousand more or
21 less registered voters out there. The Guam Election
22 Commission takes the position that under the letter of the
23 law, that was not required. And that even if the Court or
24 someone were to find that the GEC did have that requirement,
25 by one estimate, the cost would have been prohibited.

1 **THE COURT:** All right, let me rephrase the
2 question. Let's say that six months before or nine months
3 before an initiative election, you send an opinion to the
4 Attorney General and ask whether or not it's necessary that
5 the complete packet be mailed out and you get an opinion from
6 the Attorney General that says, yes, and then on election
7 day, you decide just to send out a synopsis; I'm trying to
8 figure out, you know -- I mean, you've already gotten, let's
9 say an opinion from him, that says you must mail out the
10 entire pamphlet. I mean, is that discretionary on your part
11 when he says under the laws of Guam, this is what this law
12 means and it is my opinion that you are required to send all
13 these pamphlets?

14 **MR. CABOT:** Your Honor, like any agency, I think
15 it behooves the agency and the public officers to listen to
16 the advice given by the Attorney General. But under Guam
17 law, as set by the Legislature, the Guam Election Commission
18 has very clear authority to engage its own independent
19 counsel. And under Guam law, it is very specific that --

20 **THE COURT:** I know that, but isn't it clear
21 though that the only official in the Government that can give
22 a legal opinion as to the meaning of a statute is the
23 Attorney General? So that his opinion --

24 **MR. CABOT:** Respectfully, Your Honor, I
25 disagree. Respectfully, Your Honor, that's not the statutory

1 scheme that was intended by the Legislature, in my opinion.

2 THE COURT: Okay.

3 MR. CABOT: Because of the strict and specific
4 language in the various statutes, and I will get to that.
5 But in this particular case, Your Honor, it's very clear that
6 the position of the Attorney General is diametrically opposed
7 of that of the Election Commission. The Election Commission
8 is saying we followed the law, and if we didn't follow the
9 law, we didn't have the hundred and fifty thousand dollars
10 because it wasn't appropriated by the Legislature. And even
11 if we wanted to, we could not follow the law.

12 But the Attorney General, before the November
13 election, came out publicly and said, the initiative election
14 is flawed, that the Guam Election Commission violated the
15 law, what they did was unconstitutional. And he did nothing.
16 He didn't file any lawsuit. It had to be the plaintiffs to
17 bring it before the Court. Then the Attorney General tried
18 to stipulate, in fact, didn't try, he did stipulate with the
19 plaintiffs and filed it with this Court again saying, the GEC
20 violated the law, what they did was unconstitutional, what
21 they did was wrong.

22 And now he's standing before the Court saying he
23 wants to defend the Guam Election Commission when his
24 position is diametrically opposed to the Guam Election
25 Commission, when he basically has proverbially sold the Guam

1 Election Commission down the river. He's standing before the
2 Court saying we represent the Government of Guam but our real
3 client is the public interest, the public.

4 And what that says to me, Your Honor, it almost
5 sounds like rhetoric and double talk. How do we know what
6 the consensus of the public is. There's no sensus. There's
7 no survey.

8 THE COURT: But, initially, my question though
9 is that if the Attorney General has given a legal opinion as
10 to the meaning of this statute, is there another opinion
11 within the Government that can, in a sense, counter the
12 Attorney General's opinion or have greater weight than the
13 Attorney General's opinion?

14 MR. CABOT: Your Honor, the Election Commission,
15 as I imagine, will take it under great consideration, but at
16 the end --

17 THE COURT: You're free to disagree is what
18 you're saying?

19 MR. CABOT: Yes, Your Honor. And if the
20 Attorney General sees fit, then he can sue the Guam Election
21 Commission and bring it before the Court, which is the
22 ultimate decider of interpretation of the law, Your Honor.

23 THE COURT: So if the Attorney General were to
24 send a memo out to the Election Commission and says, by
25 engaging in certain action, you are committing a criminal

1 offense, and then you advise your legal counsel members, my
2 opinion is that you're not, and then let's assume they're
3 prosecuted by the Attorney General.

4 MR. CABOT: Yes, Your Honor.

5 THE COURT: I mean, could they, as a defense,
6 say, that well, we received an opinion that it was legal from
7 our own legal counsel.

8 MR. CABOT: Your Honor, I believe that the
9 statutory scheme work as provided by the Legislature places
10 that responsibility on the legal counsel for the Commission.
11 That is one of roles of the Election Commission.

12 THE COURT: But my question is, can they raise
13 it as a defense that it's legal because our attorney said it
14 was legal?

15 MR. CABOT: I can imagine, Your Honor, but they
16 have the prerogative of adopting my opinion. I'm merely
17 advisory to the Commission.

18 THE COURT: But it subjects them to, I suppose,
19 criminal prosecution, if, in fact, the Attorney General is
20 correct.

21 MR. CABOT: I would imagine so, Your Honor.

22 THE COURT: Okay. I just wanted to see. Okay.

23 MR. CABOT: Going back, Your Honor, so the
24 Attorney General is standing before you saying we represent
25 the Government of Guam but our real client is the public

1 interest. What he's really saying, Your Honor, double talk
2 and rhetoric, is, I am supplanting my personal opinion, my
3 personal idea of what is right and wrong, what is in the
4 public interest with that of the Guam Election Commission
5 with the thirty-five years of collective institutional
6 knowledge of all of the policies that were carved out over
7 time, all of the justifications for doing why they do, how
8 they do it.

9 He is substituting his own private ideas and
10 notions of what is in the public for that of an agency. And
11 he's saying that that is allowed him because of the Organic
12 Act. And I don't agree, Your Honor. What that does is it
13 kills, it destroys, it removes the right of due process for
14 the Commission and the Executive Director that are on the
15 firing line.

16 It gags them. It doesn't allow them to stand
17 before the Court and say, Your Honor, take a look at this,
18 what about this interpretation of law, this is a reasonable
19 construction of law. If he decides, like he did in this
20 case, that I don't agree with you, I'm not even going to
21 bring it before the judge --

22 THE COURT: But that would be the same in your
23 scenario if they ask you for a legal opinion and you said,
24 well, no, we can't do that. In essence, it gags them from
25 moving into the direction they want to move based on your

1 legal opinion.

2 MR. CABOT: I would provide my legal opinion in
3 my advisory capacity. At the end of the day, it would be the
4 Commission to decide whether it adopts or rejects my legal
5 opinion. There have been times when the Commission has not
6 followed my legal opinion.

7 Now, this particular case, if the AG does not
8 like the actions taken by the Commission, he has every right
9 to sue us and bring it before the judge. But there has to be
10 an ultimate trier, or controller, protection, checks and
11 balances, because that's the basic scheme work of our
12 Government. In effect, what he's doing, Your Honor, is he's
13 also supplanting the ability --

14 THE COURT: Well, you know, if they don't want
15 to listen to your advice, maybe they shouldn't have a voice.
16 Maybe the Attorney General is right, if they don't want to
17 listen to your opinion, maybe they shouldn't have a voice.

18 MR. CABOT: I don't agree with that, Your Honor.
19 I think that it is their prerogative under the code. And if
20 their views are contrary to that of the Attorney General,
21 then we ultimately bring it to a court of law to interpret
22 the laws.

23 And in this particular scenario, Your Honor,
24 when he came out publicly and said, the election is flawed,
25 what you did was unconstitutional, and then he sat on his

1 hands and didn't file any lawsuit. In effect, what he's
2 doing is he's preventing even the courts from exercising
3 their role under the constitution of the Organic Act to
4 interpret the laws.

5 And he's supplanting and substituting his own
6 personal opinion that this is unconstitutional for that of
7 the Election Commission, the Executive Director, and I
8 submit, Your Honor, even the courts, by not filing a lawsuit.

9 THE COURT: Would it be fair to say that had
10 there been no objection filed, the Court presumably could
11 have signed the stipulation? That had there been no
12 opposition filed?

13 MR. CABOT: Yes, Your Honor, if the Court were
14 not raising any issues suasponte, they would rely on the
15 representation of the parties and their judgement, then I can
16 imagine that occurring, Your Honor. But in this particular
17 case, Your Honor, it is clear that the Guam Election
18 Commission's position is diametrically imposed. There's no
19 way that the two can be reconciled. And they do deserve the
20 right to due process and they do deserve the right to be
21 heard before this Court.

22 And you'll look at the Guam law, Your Honor, and
23 it is very clear under the Election Code that the Legislature
24 gave that right to the GEC. In 3GCA, section 2103b, it
25 states, "The Board may retain an attorney who shall be

1 admitted to practice before the courts of Guam who shall
2 advise the board and its executive officer on all legal
3 matters, all legal matters, pertaining to the Commission.
4 The designated counsel shall represent the Commission in
5 litigation in which the Commission is interested or
6 involved." And in this particular case, it's obvious that
7 the Commission is interested and very involved. Whether we
8 like it or not, we're a named defendant.

9 THE COURT: But that's all before the amendment
10 to the Organic Act.

11 MR. CABOT: Yes, Your Honor. And I'll get to
12 that, Your Honor. You even look at the enabling statute for
13 the Attorney General, Your Honor, and, again, the Legislature
14 makes it clear that agencies, autonomous agencies, public
15 corporations that have the express authority to engage their
16 independent counsel, again, are not affected by this carte
17 blanche authority that they're granting to the Attorney
18 General.

19 THE COURT: Is that in the congressional --

20 MR. CABOT: No, Your Honor. I'm referring to
21 Title 5.

22 THE COURT: Okay.

23 MR. CABOT: Which created the --

24 THE COURT: But in amending the Attorney
25 General, though, that's -- I mean, that language isn't in the

1 intent of the legislation?

2 MR. CABOT: I'm sorry, Your Honor? For Title
3 5 --

4 THE COURT: When Congress amended the Organic
5 Act, that language is not in its intent.

6 MR. CABOT: That's correct, Your Honor. And
7 I'll get to that and I will argue that the intent of
8 Congress, when it adopted 1998 amendments, was not to remove
9 the right of the Legislature to limit the powers of the
10 Attorney General, and I will argue the Airport case and I
11 will argue the Judge's ruling in the EITC case.

12 But before that, Your Honor, this was before the
13 1998 amendment, Title 5 created the elected Attorney
14 General's office. And at least in three different areas
15 there, in my opinion, it did specifically carve out
16 exceptions for agencies that have expressed authority under
17 the law to have their own independent counsel.

18 5GCA 30109C, and I'm paraphrasing here, it says,
19 The Attorney General shall appear - and gives all the list --
20 the laundry list of situations in which the Attorney General
21 may appear -- and then it indicates -- appears in all civil
22 actions in which the Government is an interested party
23 provided that those branches, departments or agencies which
24 are authorized to imply their own legal counsel, may use them
25 instead of the Attorney General.

1 And it also says it in 5GCA 30103, which
2 addresses the common law powers of the Attorney General. It
3 says, which include but are not limited to the right to bring
4 suit to challenge laws, which he believes to be
5 unconstitutional, to bring action on behalf of the Territory
6 representing the citizens. And then it goes on to say,
7 comma, unless expressly --

8 THE COURT: All right. Those are common law
9 powers given to the Attorney General by the Guam Legislature?

10 MR. CABOT: That's correct, Your Honor.

11 THE COURT: Did Congress give common law powers
12 to the Attorney General?

13 MR. CABOT: Your Honor, it did but only to the
14 extent that it was not limited expressly by legislation.

15 THE COURT: But where is that stated in the
16 Organic Act?

17 MR. CABOT: It's not. And I refer, Your Honor,
18 and that is what we're struggling with right now. We look at
19 the equities of the situation --

20 THE COURT: Assuming that the Attorney General
21 has federal common law powers given by Congress, isn't that
22 common law power only limited by what the federal government
23 legislates?

24 MR. CABOT: Yes, Your Honor, but I do believe
25 that it continued to allow the existing frame work at the

1 time, which is it led -- reserved the Legislature --

2 THE COURT: Is there any language in the
3 existing frame work that says that the Attorney General is
4 the Chief Legal Officer of the Government of Guam?

5 MR. CABOT: Are you referring to the statutory
6 --the Guam legislative frame work, Your Honor?

7 THE COURT: Yes.

8 MR. CABOT: No, Your Honor. Well, it does say
9 that he has broad -- Your Honor --

10 THE COURT: It says he has cognizance over all
11 legal matters, but is there anything that says he is the
12 Chief Legal Officer of the Government of Guam?

13 MR. CABOT: No, Your Honor. No, Your Honor.
14 And the term Chief Legal Officer is not defined in the
15 Organic Act and that's why we're having all of these
16 struggles, Your Honor.

17 THE COURT: Let me ask you this; how do we get
18 the role of Chief Legal Officer full expression as embodied
19 in the Organic Act? How do you give that full expression?

20 MR. CABOT: Your Honor, part of the problem is
21 the Organic Act didn't clarify or give enough definition, so
22 that's the struggle that this Government, all of the courts
23 here on Guam are dealing with; the Supreme Court as well as
24 this Court.

25 THE COURT: But shouldn't we get full expression

1 to that meaning?

2 MR. CABOT: No, Your Honor.

3 THE COURT: No?

4 MR. CABOT: I believe that there is a limit and
5 I believe that that limit has to be determined by these
6 courts and in interpreting what the intent was of Congress.
7 In my reading, Your Honor, my opinion is that Congress did
8 not intend on abrogating the right of the Legislature to
9 limit the powers of the Attorney General. It kept that right
10 open.

11 THE COURT: Well, see, if I follow your
12 argument, then that could mean that tomorrow, the Guam
13 Legislature can say, the Department of Administration, you
14 can have your own attorney.

15 MR. CABOT: Yes, Your Honor.

16 THE COURT: And you see no problem with that?

17 MR. CABOT: I see no problem with that. And
18 that's the way that I read that the Organic Act was intended
19 as was -- as is supported by the Airport case that came out
20 of the Guam Supreme Court.

21 THE COURT: So how can the Attorney General be
22 the Chief Officer of the Government of Guam including this
23 line agency if he has another attorney?

24 MR. CABOT: I think that he has all common law
25 powers except as are expressly limited by the Guam

1 Legislature. And I --

2 THE COURT: Let's assume that tomorrow the Guam
3 Legislature says, well, Attorney General, you don't have any
4 cognizance over all matters in which the Government is
5 interested.

6 MR. CABOT: I think there might be a problem if
7 they take away all of his rights, but I think that that might
8 be a possibility.

9 THE COURT: But when they take away
10 representation of the Department of Administration, aren't
11 they doing the same thing?

12 MR. CABOT: No, Your Honor. They are not taking
13 away all of his bundle of rights. They're only limiting --

14 THE COURT: So you're only saying that the
15 Organic Act is violated if they take away all his rights?

16 MR. CABOT: It's conceivable that it may, Your
17 Honor, but I'm not even proposing that argument. But it is
18 conceivable that they try to take away, strip him of all his
19 rights, that there may be an Organic Act problem. But I
20 believe that's for the Court to decide, Your Honor. It's not
21 relevant for this particular case. But what is clear is that
22 the Legislature, in my mind, Your Honor, is that the
23 Legislature does have the right to limit and alter the role
24 and powers of the Attorney General. And I think that this
25 --

1 **THE COURT:** As it pertains to his being the
2 Chief Legal Officer of the Government of Guam?

3 **MR. CABOT:** Yes, Your Honor. And one of the
4 examples of that is within the Organic Act, it also provides
5 for an elected prosecutor. So what they're saying is that
6 the Attorney General -- the Legislature of Guam can create
7 an elected prosector, chief prosecutor, and strip away that
8 right from the role and responsible and authority that
9 presently sits with the Attorney General.

10 So I think that the -- First of all, Chief Legal
11 Officer is not defined, but it appears that Congress intended
12 to leave and reserve that right in the Legislature because it
13 hadn't before and it did not intend on disturbing that --

14 **THE COURT:** As long as it did not diminish the
15 Attorney General's capacity to be the Chief Legal Officer of
16 the Government of Guam.

17 **MR. CABOT:** I wouldn't say diminish, Your Honor,
18 I --

19 **THE COURT:** Would this be the more reasonable
20 interpretation?

21 **MR. CABOT:** In my mind, Your Honor, I do think
22 they have the right to limit his role. And in that matter,
23 they are diminishing it. But if they were to completely
24 strip him of his right, then perhaps there might be a
25 constitutional problem in that that respect. What they're

1 doing now --

2 THE COURT: Aren't we talking supremacy clause
3 here? How can the Guam Legislature make an act that would
4 violate an act of Congress? Or limit the full expression
5 that needs to be given to a congressional amendment?

6 MR. CABOT: And it's my position that what the
7 Legislature is doing is not contrary to the Organic Act.
8 It's consistent. And in my opinion, the Congress did not
9 disturb the present frame work where the Legislature was --
10 already had that right to limit the role of the Attorney
11 General. Because in the Organic Act, it allowed the
12 Legislature prerogative to create the elected Attorney
13 General's position.

14 THE COURT: All right, but did it say that once
15 you made it elective, that you can change it?

16 MR. CABOT: It's silent on that issue, Your
17 Honor. But the fact that it also allowed them the
18 prerogative to --

19 THE COURT: Can Guam law abolish the office of
20 the Attorney General?

21 MR. CABOT: I don't know the answer to that,
22 Your Honor. But I do know that in the Organic Act, it does
23 say you can create an elected Attorney General, you can
24 create an elected Chief Prosecutor. And if they created the
25 Attorney General with all of these bundle of rights,

1 including prosecutorial rights, and then later, they
2 subsequently provide for Chief Prosecutor, they can strip him
3 of those rights.

4 THE COURT: They could because it's provided for
5 in the Organic Act.

6 MR. CABOT: That's correct, Your Honor.

7 THE COURT: Expressly provided for so we would
8 have no problem with that.

9 MR. CABOT: Correct. But it also does not limit
10 or have any language that is clear that it disturbs or
11 changes the present frame work. But the Legislature does
12 have the right to alter or somewhat diminish the role of the
13 Attorney General, and that's my position --

14 THE COURT: That might be a problem really
15 because if that were to be the case, and I can see the Guam
16 Legislature perhaps saying, all these line agencies, have
17 your own attorney, where does that leave the Attorney
18 General? Where does it leave the Congressional mandate in
19 legislating that the Attorney General be the Chief Legal
20 Officer of the Government of Guam?

21 It seems to be contradictory that you take away
22 his right to represent line agencies, Department of
23 Administration, Department of Agriculture, give it to some
24 other attorneys and say, well, that's still okay within the
25 Organic Act. I have more problems there, I think.

1 MR. CABOT: Yes, Your Honor, and that might be
2 the case if they try to go against what might appear to be
3 the intent of the Legislature. But that is not the case
4 today, Your Honor. Not every agency is given the specific
5 right to engage independent counsel.

6 THE COURT: I know, but the Legislature, you
7 say, can.

8 MR. CABOT: Yes, Your Honor.

9 THE COURT: And that's what I'm trying to get
10 at.

11 MR. CABOT: Yes, Your Honor. And we believe
12 that they do have their right under the Organic Act, and it
13 appears that the Guam Supreme Court agrees with me. And I'm
14 sure the Court is aware of the Airport case, the AB Won Pat
15 Guam International Airport case versus Moylan, which just
16 came out recently. And in that case, Your Honor, they have
17 similar facts, the Guam International Airport was before the
18 Court, just like we're today, saying we're an autonomous
19 agency, we have the expressed right by the --

20 THE COURT: But in this case though, it doesn't
21 present presumably the conflict interests that are apparent
22 in this case.

23 MR. CABOT: That's correct, Your Honor. That's
24 why we have all of the equities and rationale and
25 justification that were in the airport case, plus more,

1 because we would be stripped of our due process rights, our
2 ability to come before this Court, and we would be, in
3 effect, muted and gagged from being able to defend ourselves.

4 And in this particular case, Your Honor, this is
5 a civil rights action. Conceivably, there might be personal
6 liability on behalf of the Executive Director and the
7 Commission members. Now, gladly, it hasn't gone in that
8 direction but it is within the realm of possibility.

9 So we have Attorney General, again, that is
10 exercising his own personal notion of what is in the public
11 interest even if there is potential personal liability
12 exposure to the Executive Director and to the members of the
13 Commission. And I don't think that's correct, Your Honor.
14 And that's not what the Legislature intended clearly by the
15 statute.

16 And my opinion, Your Honor, and it's very
17 difficult to decide, and that's the big struggle that we're
18 dealing with today is, does the Organic Act abrogate and
19 remove the Legislature's right to limit the role of the
20 Attorney General's office, and I don't think so. And I agree
21 with the Supreme Court in the airport case where it
22 specifically said that the Attorney General, as Chief Legal
23 Officer, is charged with all the powers and duties pertaining
24 to the office of common law except insofar they have been
25 expressly restricted or modified by statute.

1 THE COURT: In its reference to common law, see,
2 are they referring to common law under Guam law or common law
3 under federal law? See, that's a distinction that was not
4 made.

5 MR. CABOT: In my opinion, Your Honor, I think
6 it's a distinction without a difference with all due respect.

7 THE COURT: It does, because common law that's
8 Guam, can be changed by the Guam Legislature. Common law
9 that derives under federal common law can only be changed by
10 the federal government, so it's not the same.

11 MR. CABOT: But in my opinion, Your Honor, the
12 -- in both scenarios, whether it be common law pursuant to
13 Guam statute, common law pursuant to the federal mandate,
14 both can be interpreted as being limited except insofar as
15 they have been expressly restricted from modifying by
16 statute. I think you can read the --

17 THE COURT: Is there any judge-made law that
18 says autonomous agencies, you can be represented by
19 independent counsel? Is there Guam law that says, autonomous
20 agencies, you can be represented by independent counsel?

21 MR. CABOT: Is there any statute, Your Honor?

22 THE COURT: Is there any Guam common law that
23 says, autonomous agencies, you can be represented by
24 independent counsel? Or counsel of your choice?

25 MR. CABOT: I don't believe so, Your Honor. It

1 has to be expressly mandated by the Legislature, which is
2 what we have with the Guam Election scenario --

3 THE COURT: So, you know, when you say that the
4 common law can be amended by statute, you're not really
5 amending common law because there's no Guam common law that
6 says autonomous agencies, you can be represented by
7 independent counsel?

8 MR. CABOT: 5GCA 3103 addresses the common law
9 powers --

10 THE COURT: No, but it's statutory?

11 MR. CABOT: Yes.

12 THE COURT: Your right to have independent
13 counsel is statutory. It's not common law.

14 MR. CABOT: That's correct, Your Honor. But the
15 common law, whether it be by Guam statute or the federal
16 mandate in the Organic Act --

17 THE COURT: So your ability to hire is not
18 derived from common law, it's statutorily derived.

19 MR. CABOT: That's correct, before the Organic
20 Act Amendment. But now, even if they call him the Chief
21 Legal Officer, I still think that there are limits to his
22 role, and that limit --

23 THE COURT: You see, Guam law cannot be said to
24 have amended federal common law because that Guam law was in
25 existence prior to the adoption of the federal statute.

1 MR. CABOT: I understand, Your Honor.

2 THE COURT: So it cannot be said to have
3 amended.

4 MR. CABOT: And it's my opinion that it did not
5 amend the Organic Act or federal law, Your Honor. Again,
6 it's very difficult to decipher, but the way that I read the
7 intention of Congress is they always intended to reserve and
8 leave the present frame work where the Legislature was able
9 to set the parameters of the role of the Attorney General.

10 THE COURT: But it did not say so, right? That
11 is the problem.

12 MR. CABOT: It did not say so and that's right
13 we're having this big struggle, Your Honor. But I agree with
14 the Supreme Court that if you take a rigid rule and you give
15 him all these unfettered rules and responsibilities, that it
16 will lead to and it does lead to and it has led to very
17 prejudicial, very difficult hardships and burdens for the
18 individuals and the commissions that are faced with that
19 rigid rule.

20 As the airport has indicated, Your Honor, the
21 Legislature does have the right to restrict or modify the
22 common law powers of the Attorney General. I believe, Your
23 Honor, Your Honor would be in a better position to know this,
24 and the way that I read your EITC ruling in the Santos case,
25 because you had cited to this very airport case for the

1 proposition that --

2 **THE COURT:** Actually, the airport case was used
3 to put forth a position that when the Supreme Court decides
4 an issue as to local law, the meaning of local law, that's
5 the final word; we have to follow what the Supreme Court says
6 as to what local law says. That's what we were referring to.

7 **MR. CABOT:** I understand. Although, as you
8 know, we cited for the proposition that common law powers and
9 duties may be subject to increased alteration or abridgement
10 by the Guam Legislature and that's what I would urge this
11 Court to follow would be the Guam Supreme Court ruling. There
12 were a myriad, a plethora of cases that were cited by both
13 sides.

14 I do not read any case cited by the Attorney
15 General for the proposition that where you have a state
16 constitution that calls them a Chief Legal Officer and gives
17 them all of this bundle of rights, yet you have a state law
18 that allows an agency or state officer independent counsel
19 where a court has in any event given that right of
20 representation to the Attorney General. I haven't read any
21 cases that are directly on point and I don't think any of the
22 cases that were cited by the Attorney General are on point on
23 that issue. I believe that they're misplaced.

24 **THE COURT:** Well, you know, there are cases out
25 there, but courts are having a hard time grappling between

1 the issues really.

2 **MR. CABOT:** Yes, Your Honor. Yes, Your Honor.
3 In a lot of the arguments that were made in this particular
4 case were made in every other case, I believe in the EITC
5 case and also in the Airport case, and the Supreme Court does
6 a very good job at dismissing a lot of the cases that were
7 cited from Mississippi, Alabama, Washington, Indiana,
8 California and Florida.

9 Many of these same cases are cited in the
10 instant matter, Your Honor. And I would follow -- I would
11 urge the Court to follow the rationale of the Supreme Court
12 that in finding that those cases cited by the Attorney
13 General are not on point, especially with regard to the GEC.

14 **THE COURT:** Mr. Moylan.

15 **MR. MOYLAN:** Thank you, Your Honor. Your Honor,
16 the first argument by Mr. Pangelinan should be addressed to
17 the extent of the argument was to cubbyhole the Attorney
18 General's office into what could be considered a Government-
19 paid ACLU. We're not the ACLU, the Government of Guam and
20 we're not a public interest type of law firm. Although in
21 essence, we serve the public interest. We do more than just
22 that, Your Honor. We actually represent and serve the
23 interest of the Government officials that are consistent with
24 the law and our interpretation of it.

25 I think the Court rightfully pointed out if we

1 take counsel's position, then I should stop issuing legal
2 opinions, because my legal opinions would be given the
3 treatment of the weight that they are -- basically, we'll
4 take it under advisement and then we'll take the legal course
5 of action that we feel we should take after consulting with
6 private counsels.

7 And I think the whole scheme of the way the
8 Government was created was that the Attorney General's legal
9 opinions would control the actions of Government officials
10 and, if they did not follow the legal opinion, then they'd
11 face the civil and criminal ramifications of it. The
12 Attorney General's Office, in addition to being civil
13 litigators, were also prosecutors to be able to bring before
14 the Court criminal code violations that no other private
15 lawyer can do. And that shows the *suigeneris* nature of our
16 office. We're not here making money like private lawyers
17 are. We're not only a part of the Government structure and
18 part of the Government laws, but more so in 1998, we became
19 an elected representative of the people; that we would have
20 greater control by the people, and I think that should be
21 pointed out.

22 Although we like to say that we are representing the
23 public and all their interest, we're so much more than that.
24 We are not just an ACLU type law firm. The example is put
25 before the Court that the Governor passed this law dealing

1 with notice of provisions that was already in play for
2 purposes of an election that had occurred in 2004. The
3 problem with the example is the Governor signs the law. We
4 as lawyers and as the people's lawyers believe that law was
5 inorganic or unconstitutional. It was not a good law because
6 the harm had already occurred.

7 Now, if this was to go to court, is it the
8 Governor now to come and argue the law that he signed is a
9 good law, or is it the Attorney General to come in and say,
10 that this is a good law or not a good law. The Code
11 specifically envisions the Attorney General challenging
12 statutes as they're passed, and Mr. Pangelinan used the
13 example that when the Governor signed that law it affected
14 the notice of provisions for the election, if the Governor --

15 THE COURT: But are you, in defending the
16 Election Commission, though, are you challenging it? To me,
17 when you're challenging it, it means that you take an action.

18 MR. MOYLAN: We took an action inconsistent with
19 the Election Commission's position.

20 THE COURT: But taking an action means
21 prosecuting an action; you haven't prosecuted an action.

22 MR. MOYLAN: Interestingly, the scenario that
23 came into Court was we took a position, we said that the
24 election would be invalid. Now, nobody did anything until
25 the plaintiffs sued all of us, and it became the position

1 that it was a transactional issue. What do we do now guys?
2 You guys took the action there. We disagreed with you, but
3 we didn't sue you, and that was within our right. We were
4 just waiting and seeing what happened.

5 Then the plaintiffs came out and sued all of us.
6 So, does everybody come into court now and defend their
7 positions? Or, under the way that our structure of
8 Government is organized, does the Attorney General evaluate
9 the position that they took, which happened to be that they
10 took an improper position, and then go and defend before this
11 Honorable Court. Also, Your Honor --

12 THE COURT: But, see, the rulings that we've
13 made have given you the right to bring an action in your own
14 name or in the public interest.

15 MR. MOYLAN: No, the Government of Guam, the
16 statute that was read, Title 5 GCA, our powers and duties say
17 that it's not in our name; it's in the Government of Guam's
18 name. And as criminal prosecution in the people of Guam, the
19 Government of Guam's name, we're just the lawyers
20 representing. And as they cited, we have several cases in
21 the Superior Court right now where the Government of Guam, on
22 behalf of the -- the Attorney General on behalf of the
23 Government of Guam is suing.

24 Also, Your Honor, the statement was made that
25 the -- Let's move on here. Under the arguments, again, Your

1 Honor, I think the best way to analyze the arguments of the
2 opponent counsels is to take it to its logical conclusion.
3 As the Court was just pointing out with the GEC's counsel,
4 the power to diminish is the power to destroy.

5 One inch away from taking away what Congress
6 gave us and it's going to go all the way. It's a slippery
7 slope. How much power can they take away, how much power can
8 they limit that Congress gave, and I'm speaking as to the
9 Guam Legislature. It's an absurdity. It's what we learn in
10 Constitutional Law 101; the supremacy clause controls period.

11 There is no qualification. Paragraph 2 of the
12 Airport decision that was recently rendered by the Supreme
13 Court of Guam embodied the whole problem with the legal
14 analysis. The local Legislature, as much as our office
15 supports it, cannot abrogate what Congress said. And I
16 believe that that's the truism among all of us in this room
17 today.

18 Also, the question of why did Congress give the
19 option to the Guam Legislature to make our office elected.
20 Under the scenario that's being presented, there's no reason
21 why we'd be elected if we cannot come in here on behalf of
22 the entire Government.

23 The administration would control the cabinet
24 members' positions, as well as the Attorney General's
25 position, and the Attorney General disagrees with the

1 cabinet, or with the Governor, he would be removed under the
2 powers of the Governor to remove cabinet members' appointees.

3 The fact that this is an elected office and that
4 Congress wanted it to be elected and the fact that Congress
5 put it in the prosecution are two significant points that
6 should not be diminished by the -- permitting other
7 individuals to appear before the Court as entities of the
8 Government. They're not here to set legal policy, Your
9 Honor. It is the Attorney General's office. And if I'm just
10 hear to listen to their legal position and to promote it,
11 then why am I elected? We're all here to serve the public,
12 but I'm here especially to look at the legal -- to ensure the
13 law is being followed. That's the Attorney General's rule;
14 to make sure the law is being followed.

15 They can't tell me that the laws are being
16 followed and come to this Court and say that. They can tell
17 me and I can say, I don't agree with you but I'm going to
18 tell the Court that I don't think the law is being followed,
19 and ultimately, the jury and the Court are the ones to make
20 that final decision.

21 But this transactional cost that -- we're
22 basically arguing -- we're airing our dirty laundry, Your
23 Honor. That's what's happening right now. I'm saying that
24 I'm your representative. They're saying I'm not their
25 representative and we're coming to you to complain about it.

1 When in actuality, the Court must set a very firm rule that
2 if you guys really wish to speak, the Attorney General must
3 give that position.

4 Now, there is a distinction and ex parte Weaver
5 sums it up. When they're dealing with the position, the
6 power of their office, and ex parte Weaver referred to the
7 elected official, which is the Governor, who's really their
8 boss, you know, the Election Commission. That is the
9 executive branch for purposes of what's going on in here.
10 The Governor was given the ability to come into court to
11 express his power as granted by the law. And we're not
12 arguing that.

13 And I think Mr. Wineberg, where we're trying to
14 clarify it, we cited and we stand behind the ex parte Weaver
15 case authority. In this case, there is no dissonance between
16 the Governor's position and our position to the extent that
17 it doesn't deal with his power. The only power I think the
18 Governor has in this case is whether he can call a special
19 election or can be forced to call a special Election.

20 And in that respect, we're consistent. He does
21 not believe that he can be forced. We don't believe he can
22 be forced. Therefore, he should not be in this case. Now,
23 if he says that, hey, I got power under the Organic Act and I
24 wish to express it, then he can come in. And that was ex
25 parte Weaver. But not the Election Commission. And, again,

1 these are elected officials that are coming forward that are
2 expressing their powers, not appointed officials of the
3 elected official.

4 And I think there is an important distinction as
5 well. I believe that the Court's questioning, if I
6 understood it correctly, is correct as to GEC's counsel's
7 interpretation of the statutes which give them the authority
8 to have a counsel. Take it to its logical extent, what if
9 the Guam Legislature said GEC, you cannot have an attorney.
10 Will Mr. Torres (sic) and the Election Commission say, wait,
11 we have to be heard, therefore, we're going to have an
12 attorney. And they pro bono Mr. Cabot, because you know,
13 that would be a financial problem if Legislature says you
14 can't have a lawyer. But they said, wait a minute, we feel
15 so strongly about this issue that we're going to hire
16 ourselves a lawyer pro bono, pay out of their own pocket and
17 they make an appearance in this Court.

18 You know, the structure is one Government, one
19 body, as Mr. Wineberg pointed out. And that body, through
20 the Legislature, through Congress in a way, too, has said,
21 when you come into court, we only want the Attorney General
22 to state your position. In the legislative level, that would
23 pose a problem for the Election Commission. But in the way
24 that GEC is arguing, they can still come in here, even if the
25 Legislature told them that they couldn't have an attorney.

1 So, again, take it to its logical conclusion and the proper
2 party here, on behalf of the Government and all its entities,
3 should be the Attorney General's office.

4 We have deferred in reference ex parte Weaver,
5 the Governor, and we believe the Governor, in situations, has
6 the ability. In the EITC tax case, the Court has taken the
7 congressional pronouncements and differentiated them. The
8 Governor, under the Court's interpretation, has the power to
9 administer and to enforce the tax system; hence, the Governor
10 had a right to be there.

11 The Attorney General also had a right to be
12 there because it represented the Government of Guam. But
13 this Court was arguing in terms of the Organic Act structure.
14 What the GEC is doing is they're trying to push the
15 legislative statutes to the level of a constitutional Organic
16 Act level. And I believe this Court understands that that
17 cannot be done.

18 There is a federal common law that was created
19 and there is no Guam common law and local Legislature cannot
20 alter or diminish the power of Congress's granting the
21 federal common law. It can increase and add to the powers
22 and duties of the Attorney General's office, but cannot
23 decrease or reduce the power. And those were the troubling
24 statements in the recent Supreme Court of Guam decision that
25 it could abridge the power.

1 Your Honor, we also have indicated, in prior
2 briefs and maybe not in this one, that the Chief Legal
3 Officer language, the Court asked, well, how do we determine
4 the powers of the Attorney General's office. It's been
5 referenced that well, it's the federal common law power that
6 was granted. Well, Chief Legal Officer were the magical
7 words that were used in 1998, not out of wool cloth.

8 Mr. Troutman referenced states such as Illinois
9 Mississippi, South Carolina, Florida, Georgia, Massachusetts,
10 Montana, and Washington state. Those states specifically had
11 used and interpreted language on legal officer, Chief Legal
12 Officer, within their constitutions and dealt with many of
13 these ethical situations over the past century.

14 Interestingly, the --

15 **THE COURT:** See, whatever every state has
16 decided regarding their Attorney General is their state
17 common law.

18 **MR. MOYLAN:** The interpretation I point on that
19 particular question, primarily to Illinois, which has been
20 adopted even by the sitting Justice Gatewood in the Castro
21 decision, the lower court decision. The Illinois statute
22 specifically talked about the ethical considerations and that
23 we are *suigeneris* and we have special standing before the
24 Court and should not be treated like a private law firm as
25 counsels are arguing today.

1 Again, Your Honor, the language originally went
2 to Congress, and this was when Delegate Underwood was there,
3 and I have a whole copy of it. It was Section 3 of this
4 particular bill. It was introduced by Delegate Underwood.
5 The original language stated the Government of Guam may
6 establish by law an Office of Attorney General within the
7 executive branch of the Government of Guam. And then it says
8 such law shall provide for certain provisions. That
9 statement was not adopted by Congress eventually.

10 Also, Your Honor, the language -- we are the
11 only executive branch office that doesn't have subject to the
12 laws of Guam in the Organic Act. And that's important
13 because it shows that the Governor -- I believe the public
14 auditor just authorized the Governor and Lieutenant Governor
15 have statements after their enabling legislation that says
16 subject to the laws of Guam in the Organic Act.

17 When Congressman Underwood made the 1998
18 amendment decades after the Organic Act language was adopted,
19 I believe in 1969 or '70, for the elected governor, they did
20 not put the language subject to the laws of Guam with the
21 Attorney General's language. And, hence, the reason why the
22 local Legislature could not modify its language.

23 The Congressional history also supports that
24 they want an attorney general strong enough to be able to
25 perform certain duties of enforcing the law without being

1 subject to local, political interference. Hence, if anybody
2 wants an amendment to the attorney general's authority, they
3 must go back to Congress and present that to the Congress for
4 change.

5 But the original language as used, as well as
6 Resolution, I believe it was 186, presented at the time to
7 the Congress, specifically wanted the Attorney General
8 subject to the laws passed by the legislature. But Congress
9 did not agree with that language and passed it in its current
10 form, which, again, shows by actual Congressional history
11 that this office was not subject to legislative altercation
12 by reducing the power.

13 Illinois, by the way, Your Honor, does put
14 subject to the laws of their government legislature where
15 they have their Legal Officer language.

16 THE COURT: So does that mean that we go to
17 Congress to determine what your duties and responsibilities
18 are?

19 MR. MOYLAN: Not at all, Your Honor. The
20 language, Chief Legal Officer, embodies the century of legal
21 -- of power granted to that type of language. And in the
22 cases that the Court pointed out, federal common law -- and I
23 do have a list of the federal common law powers or the common
24 law powers as have been adopted in states where jurisdictions
25 that use language such as ours.

1 **THE COURT:** You see, that's my whole point
2 really that when you're talking about the common law powers
3 of the Attorney General, you're talking about state common
4 law powers.

5 **MR. MOYLAN:** Interestingly, Your Honor, we're
6 the only local jurisdiction -- the only state or territory,
7 for that matter, that has its powers in the federal
8 constitution. I mean, the Federal United States Codes. No
9 other territory and no other state has the unique character
10 that we have.

11 Puerto Rico, Virgin Islands, American Samoa,
12 their attorneys general are purely local statutory
13 enactments. All the states using their own local
14 constitutions. But Guam, because we're administered by
15 Congress, we have that Organic Act; our constitution goes
16 into their federal statutes, have -- we're the only Attorney
17 General, other the United States Attorney General, who's
18 appointed to be in a federal statute. And that's the
19 significance. That in itself showed why we're there is
20 because of the protection against local alterations of our
21 power. The statement in the federal code says, one, you
22 shall --

23 **THE COURT:** You know what the problem is though,
24 the act is the void of any description to your power.

25 **MR. MOYLAN:** Your Honor, in fact, there's two

1 responses. One, Chief Legal Officer of the Government, it's
2 a statement of power in itself. Chief Legal Officer of the
3 Government.

4 THE COURT: That's what we need to interpret.
5 And that what's we need to define.

6 MR. MOYLAN: Yes, sir. But in a way, it's a
7 power in itself. It's a statement. Chief means the head,
8 top. Legal officer, attorney, of the Government of Guam

9 THE COURT: So do we interpret your powers in
10 relation to the powers of the United States Attorney General?

11 MR. MOYLAN: I don't believe that that was part
12 of the Congressional history. But at the same time, we are
13 both peoples -- We are the attorney for the people. More
14 importantly, again, Your Honor, because the Congressional
15 history shows -- how do we choose that language? It was
16 Delegate Underwood. It was his office that presented it
17 originally. It was the committee on -- it was the last --
18 whatever the head of Alaska said at the time.

19 He -- they looked at local jurisdictions. In
20 Mr. Troutman's Congressional history, his letters to Delegate
21 Underwood, they referenced Illinois, specifically the Chief
22 Legal Officer language. And that's why it embodied -- it
23 pulled in the case law interpretation of Legal Officer. And,
24 again, that's why I have a list of thirteen powers, common
25 law powers, that the states have afforded to that language

1 when the states were determining what does Chief Legal
2 Officer mean in their jurisdictions, which Guam incorporated
3 in 1998 after their century-long debate over the issue and
4 case authority. We summed it up. Instead of saying okay,
5 these are all your powers, all thirteen of them or all twenty
6 of them.

7 **THE COURT:** Your power to prosecute is based
8 solely on Guam law?

9 **MR. MOYLAN:** No, sir. Thank you, Your Honor,
10 for bringing that up. It is -- number 8 on my list here;
11 prosecute criminal activity is a common law power of the
12 Attorney General. The statute that's cited by GEC's counsel
13 is the Organic Act statute. As the Court pointed out, the
14 Organic Act puts all these little powers where it wants each
15 position to hold. Well, it said, first -- lists the public
16 prosecutor law --

17 **THE COURT:** But there's no Guam law. There's no
18 Guam coding by any court that says you have the right to
19 prosecute; it's statutorily derived.

20 **MR. MOYLAN:** In fact, Your Honor, it is federal
21 common law. The power to prosecute is a federal common law
22 power given to the Attorney General. The power to separate
23 the office's power to prosecute is in the Organic Act and
24 says that you can pull that power away from the Attorney
25 General if Guam Legislature can pass the law says so. Just

1 like you can make the Attorney General elected if you want
2 to, local Legislature. The senators, congressmen,
3 specifically said you can do these things if you choose to do
4 so. Otherwise --

5 THE COURT: But would that be incorrect to say
6 that under Guam law, historically, the ability to prosecute
7 belonged to the island attorney, and then from there it was
8 transferred to the Office of the Attorney General?

9 MR. MOYLAN: The statutory scheme specifically
10 has a section in there; the Attorney General shall be the
11 public prosecutor. It's in Title 5. It's one of the powers
12 delegated to the statutory Attorney General in our code prior
13 to the 1998 amendment. That's why they have a problem, the
14 Governor has a problem, saying that he has the duty to
15 faithfully execute the law. He cannot go into Court tomorrow
16 and represent the people of Guam and prosecute Joe Blow
17 Citizen.

18 That power has been specifically reserved by
19 Congress, and even our local statutes, before the 1998
20 Congressional amendment, to only the Attorney General. In
21 the past, though, the Governor really did control prosecution
22 because he controlled the Attorney General by appointment.
23 If the Attorney General didn't do something the Governor
24 wanted, he could replace him with another Attorney General.
25 And, of course, this is subject to Congressional legislative

1 confirmation process.

2 But, yes, the power to prosecute is part of the
3 federal common law powers in the Organic Act, but can be
4 taken away by legislative enactment by the public prosecutor
5 as permitted under the Organic Act. The Office of the
6 Attorney General also, Your Honor, is the only other
7 executive branch agency or entity, other than the Governor
8 and Lieutenant Governor, and as well as the Legislature and
9 the Judicial branch that must exist.

10 The fact that -- the way the language is used in
11 the Organic Act, unlike the Public Auditor, where it says the
12 Legislature can't create Public Auditor, Congress said you
13 shall have a Chief Legal Officer who shall be the Attorney
14 General of Guam and shall be the Chief Officer of the
15 Government of Guam.

16 That says two things: One, you shall have an
17 Attorney General that cannot be eliminated by local statute;
18 and two, these are his powers. They didn't say, Guam
19 Legislature, define what his powers are. They said, he shall
20 be the Chief Legal Officer of the Government of Guam. It's a
21 statement saying that he shall exist, whether as appointed or
22 elected, and this is what it is; Chief Legal Officer of the
23 Government.

24 And, again, that's all in the Organic Act.
25 We're talking the constitutional law, not subject to

1 legislative alteration to reduce. That question has come
2 before the other jurisdictions about what the legislature
3 could do in those other states. They could add to the powers
4 and add to the duties, but not diminish. They can give more
5 duties to the Attorney General but they cannot diminish the
6 duties or the power.

7 There's also a statement made about the personal
8 liability, Your Honor. The Attorney General's office is
9 representing this entire Government and everyone's official
10 capacities. If there was in 1983, potential action against a
11 Government official, there's a separate issue on whether or
12 not the Attorney General's office would represent that
13 particular entity, and that person cannot be using any
14 Government resources for defending themselves personally
15 without the -- I believe it's the Attorney General and the
16 Governor that must authorize any defense of personal
17 lawsuits, personal liability against Government officials.

18 I think that is the scheme of which has been set
19 up. We're here only on official capacity. That was the cite
20 made by GEC's counsel that they were sued on a personal
21 capacity. And I think that kind of sums up why we're here,
22 Your Honor. We're all one Government. We're all here doing
23 official acts. And, ultimately, the people of Guam are the
24 client; are the client of the attorney, and the people who
25 direct and place the other Government officials. But the

1 scheme is one -- it's supposed to be one coherent scheme, and
2 not broken.

3 THE COURT: All right, Mr. Attorney General, do
4 you have anything else to say?

5 MR. MOYLAN: That is all, Your Honor. Thank
6 you.

7 THE COURT: The matter that is before the Court
8 for a motion to strike, obviously, we're faced with deciding
9 difficult issues really, and this decision has to come out in
10 the form of a report and recommendation to the district judge
11 in which the parties are given the opportunity to file their
12 objections to the Court.

13 In looking at the matter before the Court, I
14 just wanted to tell the parties where there are areas of
15 concern that -- I'm concerned about. And as I've indicated
16 in my questioning of Mr. Wineberg, really, one of the
17 questions that concerns me most is the role of the Attorney
18 General. Because he does have a dual role and in his role of
19 defending a Government official or a Government entity, what
20 are his responsibilities in that regard. Furthermore,
21 whether the Rules of Professional Responsibility applies, so
22 that in effect, he comes in and represents and represents
23 based on the desires of the defendant that he represents.

24 The other thing I'm looking into is whether the
25 matter that's before the Court has reached a point where

1 there are obvious conflicts, and perhaps possible
2 representation; the Election Commission has asked us to rule
3 on a constitutional issue. That's whether Guam law --
4 whether he, under Guam law, can continue to be -- to serve,
5 rather, as counsel for the Guam Election Commission, and
6 obviously, constitutional issues, to the extent that they can
7 be avoided, based on other reasoning, that will also be my
8 view to the extent that we need not decide a constitutional
9 issue that would be best in deciding this matter.

10 So those are concerns that are before me. And
11 to the extent that we need not address a constitutional
12 issue, the Court will not address it at this point. I've
13 missed my lunch, but I want to congratulate the attorneys for
14 their arguments before the Court.

15 This is an interesting area because we're moving
16 along. We're making laws. We're moving along. The Attorney
17 General, his elected position, is new within the Government
18 of Guam. His duties and responsibilities and roles are
19 emerging and we don't know where it goes at this point.

20 So I hope -- I want to thank you, really, for
21 your participation this afternoon. It was worth every minute
22 sitting here listening to you make these arguments. It's
23 worth missing my lunch. And let me thank you for being here
24 and your excellent presentation to the Court today.

25 And let me close by saying that, hopefully, I

1 can have a report and recommendation to be submitted to the
2 district judge some time next week. So, counsel, on behalf
3 of the Court, thank you very much for being here this
4 afternoon and thank you for the fine arguments that you've
5 presented to the Court. Thank you and good day.

6 **MR. MOYLAN:** Thank you, Your Honor.

7 **MR. PANGELINAN:** Thank you, Your Honor.

8 **MR. CABOT:** Thank you, Your Honor.

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10 [Whereupon at 2:08 p.m., the
11 proceeding was concluded.]
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REPORTER'S CERTIFICATE

DISTRICT COURT OF GUAM)

I, Veronica A. Flores, Certified Shorthand Reporter, hereby certify that at said time and place I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting under my direction; and the foregoing transcript, pages 1 to 105, both inclusive, constitutes a full, true, and correct record of such testimony adduced and oral proceedings had and of the whole thereof.

Witness my hand at Barrigada, Guam, this 21st day of March 2005.



Veronica A. Flores, CSR-RPR